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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 18

WILLIAM BECK, PETITIONER,

vs.

OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR CERTIORARI FILED DECEMBER 23, 1963
CERTIORARI GRANTED FEBRUARY 17, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 696

WILLIAM BECK, PETITIONER,

vs.

OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 15, 1964

[fol. A]

IN CLEVELAND MUNICIPAL COURT

AFFIDAVIT—POSSESSION OF POLICY, CLEARING HOUSE, ETC.—
Filed November 13, 1961

R. C. 2915.111

The State of Ohio,
Cuyahoga County,
City of Cleveland, ss.

Before me, J. F. Dempsey Deputy Clerk of Cleveland Municipal Court personally came Michael Haney who being duly sworn according to law, deposes and says, that on or about the 10 day of November A. D. 1961, at the said City and County, one William E. Beck did unlawfully own, possess, have on or about his person, have in his custody or have under his control a certain quantity of clearing house slips representing a number of shares or an interest in a scheme of chance known as the "Numbers Game", to-wit: clearing house

and further deponent says not; contrary to the form of the Statute in such cases made and provided and, against the peace and dignity of the State of Ohio.

Michael Haney, Ptl. #258.

Sworn to and subscribed before me, this 13 day of Nov. A. D., 1961.

Ralph S. Locher, Prosecuting Attorney, of Cleveland Municipal Court, By Paul D. White, Assistant Prosecutor.

Helen J. Lyons, Clerk of Cleveland Municipal Court,
By J. F. Dempsey, Deputy Clerk.

[fol. B]

IN THE CLEVELAND MUNICIPAL COURT

R. C. 2915.111

WARRANT—POSSESSION OF POLICY SLIPS—November 13, 1961

The State of Ohio,
Cuyahoga County,
City of Cleveland, ss.

To the Bailiff of the Municipal Court of Cleveland—Greeting:

Whereas, Complaint upon oath by Michael Haney has this day been filed with me, Helen J. Lyons, Clerk of the Municipal Court of Cleveland, that on or about the 10 day of Nov. A. D. 1961, at said City and County, one William E. Beck did unlawfully have in his possession, or in his custody, or under his control, a certain quantity of clearing house slips which represents or is a memorandum of, or is evidence of, or which is designed or intended to be used as a memorandum or evidence of, or which is designed or intended to be used in the process of making, settling, paying, registering, evidencing or recording an interest in a certain scheme of chance, to-wit: clearing house

and further deponent says not; contrary to the form of an Ordinance of said City in such cases made and provided.

These Are Therefore, in the name of the State of Ohio, to command you that you take the said Defendant if he be found in your jurisdiction and take and safely keep the said defendant, so that you have him forthwith before our Municipal Court, to answer to said complaint, and be dealt with according to law.

Given Under My Hand, and the seal of said Court, this 13 day of Nov. A. D. 1961.

Helen J. Lyons, Clerk of the Municipal Court of Cleveland, By J. F. Dempsey, Deputy Clerk of the Municipal Court of Cleveland.

[fol. C]

IN THE CLEVELAND MUNICIPAL COURT

CRIMINAL BRANCH

Case No. 775552

STATE OF OHIO, Plaintiff,

—vs.—

WILLIAM BECK, Defendant.

MOTION TO SUPPRESS—Filed December 4, 1961

State of Ohio,
Cuyahoga County, ss.:

Now comes the defendant, William Beck, by his Attorney James R. Willis and respectfully moves this Court for an order suppressing certain evidence herein, and in support thereof avers as follows:

That the defendant herein is charged with a violation of Revised Code of Ohio, Section 2915.111, wherein it is alleged that on or about the 10th day of November, 1961, he had in his possession or under his control certain illegal clearinghouse slips.

That on the above date, he was the operator of a vehicle being driven in The City of Cleveland, that at said time certain members of The Cleveland Police Department, whose names are unknown to this motion, curbed the vehicle in which the defendant was traveling, and illegally detained, arrested and searched the defendant.

Your petitioner further states that, at the time of said search and seizure the aforementioned officers did not have a search warrant, an arrest warrant, nor any other process for the arrest of your petitioner, and the search of his property. Further that at the time of his arrest he was not informed of the cause of his arrest.

[fol. D] That the aforementioned arrest, search and seizure was without authority, unwarranted, illegal, unreasonable, unconstitutionally and void in that it violates the

Fourth Amendment to The Constitution of The United States and the use of any property seized as alleged evidence infringes upon the privilege against self-incrimination, as guaranteed by the Fifth Amendment to The Constitution of The United States.

Wherefore, your petitioner prays that an order be entered by this Court suppressing the items so unlawfully seized and that the same be excluded as evidence against the petitioner upon the trial of this cause, further that all conversations after said illegal arrest be similarly ordered suppressed.

James R. Willis, Attorney for Defendant, 202 C.T.S. Building, 1404 East Ninth Street, Cleveland 14, Ohio, 781-1020.

[fol. E] [File endorsement omitted]

[fol. 3]

[File endorsement omitted]

State of Ohio,
County of Cuyahoga,
City of Cleveland, ss.:

IN THE CLEVELAND MUNICIPAL COURT

CRIMINAL BRANCH

No. 775,552

STATE OF OHIO, Plaintiff,

—vs.—

WILLIAM BECK, Defendant.

Defendant's Bill of Exceptions—Filed December 14, 1961

Be It Remembered that on Thursday, December 7, 1961, this cause came on for hearing in Court Room No. 2 of said Court, before the Honorable Hugh A. Corrigan, one of the Judges of said Court.

Whereupon the following proceedings were had:

[fol. 4] DEFENDANT'S MOTION TO SUPPRESS

Thereupon the defendant, to maintain the issues on his part to be maintained as to the motion to suppress the evidence filed in this cause, a copy of which is attached hereto as Appendix A and incorporated herein by reference, called as a witness one Carl Delau, who, having been first duly sworn, was examined and testified as follows:

CARL DELAU.

Direct examination.

By Mr. Willis:

Q. Sergeant, will you state your full name, please?
A. Carl Delau, D-e-l-a-u.
Q. And you are a member of the Cleveland Police Department assigned to the Bureau of Special Investigations?
A. Yes, I am.
Q. You participated then in the arrest of William Beck?
A. I did participate.
Q. Was that on the 10th day of November of 1961?
A. It was.
Q. Where approximately was it where you arrested Mr. Beck?
A. I arrested him on Beulah Avenue, just off East 115th Street, at 1:00 o'clock on that date.
Q. Beulah is between Ashbury and Superior Avenues, generally?
A. Yes; running east and west.
[fol. 5] Q. About what time was it that you first saw Mr. Beck?
A. A few minutes before 1:00 p.m. that afternoon.
Q. And he was in his automobile?
A. He was driving his automobile.
Q. He was proceeding then lawfully down the street?
A. He was operating north on 115th Street.
Q. And you stopped him?
A. We stopped him going east on Beulah.
Q. You did not stop him for any traffic offense?
A. No; I did not stop him for that reason.

Q. You caused him to pull over to the curb?

A. I identified myself and requested him to pull over to the curb.

Q. Then you searched his automobile?

A. Yes, I did.

Q. Prior to that, did you indicate to him that he was under arrest?

A. Not while searching the automobile.

Q. In other words, you searched the automobile before you placed him under arrest?

A. I placed him under arrest just as we were searching the automobile.

Q. Prior to that time, you had not discovered anything that was illegal?

A. Other than a hunting knife in the automobile, that [fol. 6] was it.

Q. Why then did you place him under arrest?

A. I placed him under arrest for a clearing house operation, scheme of chance.

Q. At that time, you had discovered some evidence of a scheme of chance?

A. I did not.

Q. At the time you place him under arrest, you did not have any evidence?

A. Other than information.

Q. In other words, you heard rumors?

A. I heard reports and found that he has a record in connection with clearing house and scheme of chance.

Q. Previous convictions?

A. Yes.

Q. On this information, you arrested him on the City streets?

A. On Beulah Avenue.

Q. And you searched the automobile?

A. Yes.

Q. Did you find anything as a result of that search?

A. No.

Q. Then what did you do?

A. I conveyed him to the Fifth District, where we searched him.

[fol. 7] Q. In other words, you didn't find anything as a result of your search of the automobile?

A. That is correct.

Q. Then he was transported to the Fifth District Station, which is on Chester Avenue?

A. 107th and Chester.

Q. At 107th and Chester, you then searched Mr. Beck?

A. I did.

Q. Prior to your searching of Mr. Beck, he was under arrest?

A. Yes, he was.

Q. And prior to the search you made at the Fifth District Station, you had not discovered anything that was connected with clearing house, had you?

A. No, because I had not searched him on the street.

Q. In other words, you had not searched him?

A. Yes.

Q. But he was under arrest?

A. Yes.

Q. Then, at the Station house, did you make a search of Mr. Beck?

A. Yes, I did.

Q. What did that search disclose, if anything?

A. Searching the pockets of his jacket, coat, and searching underneath the trouser leg, beneath the sock of his leg [fol. 8] I found an envelope with sheets of a clearing house of that date.

Q. Then you charged him?

A. Yes, with that particular violation.

Cross-examination.

By Mr. Bessenyey:

Q. Did you recognize this man by sight when you saw him in the automobile?

A. Yes, I had a police picture of him and knew what he looked like.

Q. From your investigation and knowledge of this man's record, did you find it reasonable to make a search of his automobile?

A. Yes, I did.

Q. And you say you took him to the Fifth District where he was searched, and then in the sock, one of his socks, you found the slips, is that true?

A. I found an envelope which contained clearing house sheets.

Q. Do you have the slips here?

A. Yes, I have.

Q. Handing you what for the purposes of identification shall be referred to as an envelope containing numerous clearing house sheets, I will ask you whether or not those [fol. 9] were what you found in the sock.

A. Yes, this is the envelope which we found in his sock, and these clearing house tout sheets.

Q. They represent an interest in a scheme of chance, is that true?

A. Yes.

Q. Known as clearing house?

A. Yes, they do.

OFFER IN EVIDENCE

Mr. Bessenyey: I will offer them into evidence, if your honor, please.

Q. Did you have reasonable and probable cause to stop this man?

A. Yes, I did.

Mr. Willis: Objection; that calls for a conclusion.

Q. Is that true?

A. Yes, I did.

Q. Based on his previous record?

A. Information and previous record and observation.

Redirect examination.

By Mr. Willis:

Q. Mr. Delau, you did not have an arrest warrant, did you?

A. I did not.

Q. You did not have a search warrant?

[fol. 10] A. I couldn't get one under those conditions.

Mr. Willis: I ask that that portion be stricken as not responsive to the question.

Q. Did you have one?

A. No.

Q. When you left the Station, did you have in mind stopping Mr. Beck?

A. I had in mind looking for him in the area of East 115th Street and Beulah, stopping him if I did see him make a stop in that area.

Q. And that is what you did?

A. That is what I did.

Q. Then you had a reasonable opportunity prior to going out to Beulah Avenue where you obviously anticipated Mr. Beck would be to have procured a warrant to arrest or search Mr. Beck?

A. What type of a warrant?

Mr. Willis: Objection.

Q. Did you have an opportunity to do that?

A. I had no opportunity, because there is no warrant available for such an occasion.

Q. No warrant available?

A. No warrant available for that type of an occasion.

Q. You are admitting you had no reasonable grounds to [fol. 11] search him?

A. I did too.

Q. The Clerk's office was open, was it not?

A. Yes, it was.

Q. What time was it?

A. A few minutes before 1:00 o'clock p.m. in the afternoon.

Q. You indicated that you knew of Mr. Beck's previous record?

A. Yes, I did.

Q. What was that, sir?

A. Three arrests for clearing house violations.

Q. When was this?

A. They were all during the year 1959, I believe.

Q. All during the year 1959?

A. Yes.

Q. Then you didn't have any arrests that you knew of as far as 1960 was concerned?

A. Not to my knowledge.

Q. You indicated that you were operating on information?

A. Yes.

Q. From whom did you get this information?

Mr. Bessenyey: Objection.

The Court: Overruled.

A. I couldn't divulge that information.

[fol. 12] Q. I didn't understand you.

A. I couldn't divulge that information.

Q. But someone specifically did relate that information to you?

A. Yes.

Q. And you knew who that person was?

A. Yes.

Mr. Willis: If the Court please, I would like the Court to admonish the Sergeant that he is under oath as a witness in this case, and when the Court overrules objections, it becomes his duty to answer the question.

Q. I will ask you again, Mr. Delau, who told you this information?

A. I don't feel free to give that information. As a police officer, I cannot betray the confidence where someone gave me information.

Mr. Willis: I ask the Court to direct the Sergeant to respond to the question.

Mr. Bessenyey: This is a privileged communication and confidential to the members of the Cleveland Police Department exclusively.

Mr. Willis: The privilege statute creates privileged positions, lawyer-client, doctor-patient, there is no such privi-

[fol. 13] lege that exists between the informer and a policeman.

I call to the Court's attention the People versus Rosario, which has decided this very issue. There was a privilege statute and the Supreme Court took the position that between a privilege and a constitutional right, so far as the

informer's privilege was concerned, the informer's privilege must bow to the right. This officer is now testifying that he had reasonable grounds to do whatever he did.

We are entitled to know the basis of this determination. We should know who the informer was, the reliability of the informer and whether or not the facts as he found them corresponded substantially with what occurred.

I think that on that basis, we are entitled to know and the penalty for the Sergeant refusing would make, in order, a motion to strike all his testimony.

The Court: As far as I know, there is no privileged communication from policeman to informer unless you have a section—

Mr. Bessenyey: Is the Court ordering him to answer that question?

[fol. 14] The Court: Can you give me any authority?

Mr. Bessenyey: It is a confidential matter.

The Court: As far as I know, there is no statute in Ohio, at least regarding the confidential communications between the informer and police officer.

Mr. Bessenyey: It has been a matter of policy in this courtroom not to divulge the informer's name, if there was an informer.

The Court: I am going to withhold ruling on that for the time being.

Mr. Willis: Thank you, Sergeant. No further questions.

The Court: I have a question, Officer.

When you placed this man under arrest, did you place him under arrest for a felony or a belief that a felony had been committed?

The Witness: Under a belief that a felony had been committed under the State law, carrying on a scheme of chance is a felony, and on that basis, I arrested him.

Mr. Willis: We rest on the motion.

[fol. 15] The Court: For the record, I am not going to order the patrolman to testify as to the name of the informer on the grounds of irrelevancy.

Is that all?

Mr. Bessenyey: That is all.

Thereupon the defendant rested.

Thereupon the plaintiff rested.

The above and foregoing, was all of the evidence offered, given and received by each and all of the parties to this cause, at the hearing of same, in said Municipal Court of Cleveland, Cuyahoga County, Ohio.

The Court: The Court will overrule the motion to suppress on the grounds that this was a search incidental to an arrest. The arrest was a proper and lawful arrest and it is determined by the State wherein the arrest was made. In this State, an arrest may be made upon reasonable grounds and belief that a felony has been committed.

(Discussion had off the record.)

The Court: A lawful arrest has been made, and this [fol. 16] was a search incidental to that lawful arrest. The Court will overule the motion to suppress.

Mr. Willis: Exception.

The Court: Do you want to proceed?

Mr. Willis: We are ready to proceed.

STIPULATION

Mr. Willis: I will stipulate that the evidence offered by Sergeant Delau, I will stipulate that he would testify on the evidence in accordance with the manner in which he has testified on the motion to suppress.

The Court: Off the record.

(Discussion had off the record.)

The Court: Let the record so indicate that counsel is entering a plea of not guilty with a finding of guilty and stipulating that the facts in the motion would be the same as would be presented at the trial of this cause.

(Discussion had off the record.)

[fol. 17]

COURT'S FINDING

The Court: The motion to suppress is overruled. There was a plea of not guilty with a finding of guilty. Sentence is $500 & C. Execution of sentence is suspended until December 11th.

[fol. 18]

IN COURT OF APPEALS OF OHIO

EIGHTH DISTRICT, CUYAHOGA COUNTY

January Term A. D. 1962

C.A. 25,890—M.C. 775,572

THE STATE OF OHIO, Plaintiff-Appellee,

vs.

WILLIAM BECK, Defendant-Appellant.

Appeal by William Beck, Defendant-Appellant (LAW).

MANDATE TO MUNICIPAL COURT

This Cause came on to be heard on the appeal on questions of law from the judgment of Cleveland Municipal Court and was argued by counsel for both parties; and upon consideration, the Court finds no error prejudicial to the appellant, and, therefore, the judgment of Cleveland Municipal Court is affirmed and it is ordered that Appellee recover of Appellant its costs herein taxed.

The Court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing Cleveland Municipal Court to carry this judgment into execution. Signed Julius M. Kovachy, Presiding Judge.

I, Emil J. Masgay, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness, my hand and the seal of said Court, at Cleveland, this Twelfth day of July A. D. 1962.

Emil J. Masgay, Clerk, By A. M. Harrington, Deputy.

[fol. 19]

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT, CUYAHOGA COUNTY

To the Honorable Municipal Court, in and for the City of Cleveland Ohio, Greeting:

You are Hereby Commanded that, without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, Emil J. Masgay, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this Twelfth day of July A. D. 1962.

Emil J. Masgay, Clerk, By A. M. Harrington, Deputy.

Journal 26, page 232

MANDATE

M. C. 775,552
C. of A. 25,890

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COURT OF APPEALS OF OHIO

EIGHTH DISTRICT, CUYAHOGA COUNTY

THE STATE OF OHIO, Appellee,

vs.

WILLIAM BECK, Appellant.

Filed Oct 19, 1963.
Helen J. Lyons, Clerk.
Ralph S. Locher, etc., Att'ys for Appellee.
James R. Willis, Atty for Appellant.

Mandate from The Supreme Court of Ohio affirming Court of Appeals—

Mandate from Court of Appeals affirming Trial Court—
Sentence ordered executed.
9.00 Ct Cost
1.00—Bailiff

10.00

[fol. 20]

IN THE SUPREME COURT OF OHIO

No. 37808

THE STATE OF OHIO, Appellee,

v.

BECK, Appellant.

Criminal law—Search and seizure—Search of person after valid arrest without warrant—Articles seized admissible in evidence, when—Identity of informer—Refusal to order disclosure of, not reversible error, when.

1. All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.

2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him.

Appeal from the Court of Appeals for Cuyahoga County.

Defendant, William Beck, appellant herein, was charged in the Cleveland Municipal Court under Section 2915.111, Revised Code, with the offense of having in his possession and under his control on the 10th day of November 1961 certain clearing-house slips.

Before trial, defendant filed a written motion to suppress the evidence on the ground that his arrest and the search of

his person, resulting in the discovery and seizure of incriminating evidence, were unauthorized, unwarranted, unreasonable and a violation of his rights under the Fourth and Fifth Amendments to the federal Constitution. The motion was heard and overruled. A plea of not guilty was entered, and the defendant was found guilty and fined.

An appeal on questions of law to the Court of Appeals [fol. 21] resulted in the affirmance of the judgment below, and the cause is now here for decision pursuant to an appeal as of right and the allowance of a motion to require the Court of Appeals to certify the record.

Mr. Ralph S. Locher, director of law, Mr. Richard F. Matia and Mr. Edward V. Cain, for appellee.

Mr. James R. Willis, for appellant.

OPINION—June 26, 1963

ZIMMERMAN, J. Section 2915.111, Revised Code, recites:

"No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. *Ex parte Thorpe*, 66 Ohio App., 128, 32 N. E. (2d), 571, affirmed, 137 Ohio St., 325, 30 N. E. (2d), 335. See also, *In re Thorpe*, 132 Ohio

St., 119, 5 N. E. (2d), 333, and *Smith* v. *Alvis, Warden*, 72 Ohio Law Abs., 267, 268, 134 N. E. (2d), 868, 869.

The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped [fol. 22] the car and searched it, without result. Defendant was then arrested and taken to a police station, and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction.

In response to questions asked him by counsel for the defendant, one of the arresting officers testified as follows:

"A. I heard reports and found that he [defendant] has a record in connection with clearing house and scheme of chance.

"Q. Previous convictions? A. Yes."

Although there are a number of errors assigned by defendant, only two are of real importance:

1. Were the clearinghouse slips obtained by an illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2. Did the trial court err in refusing to order the police to disclose the identity of the informer?

The search herein took place as an incident of an arrest, and it has been held that a search which is incidental to a valid arrest does not constitute an unreasonable and illegal search. *Harris* v. *United States*, 331 U. S., 145, 91 L. Ed., 1399, 67 S. Ct., 1098.

Defendant was arrested, without a warrant, for what an arresting officer believed and had probable cause to believe was the commission of a felony (Section 2915.111, Revised Code). In the circumstances, then, was such arrest valid?

Section 2935.04, Revised Code, describes when an arrest may be made without a warrant and reads as follows:

"When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Next, was there probable cause for making the arrest? "Probable cause" is incapable of any exact definition applicable to all cases. However, the Supreme Court of the United States said in *Henry* v. *United States*, 361 U. S., 98, 102, 4 L. Ed. (2d), 134, 80 S. Ct., 168:

"Probable cause exists if the facts and circumstances [Fol. 23] known to the officer warrant a prudent man in believing that the offense has been committed." See, also, *Draper* v. *United States*, 358 U. S., 307, 3 L. Ed. (2d), 327, 79 S. Ct., 329.

Therefore, a question of fact is presented in each case, and where the facts in the possession of the police are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and that the accused committed it, probable cause is present.

In the hearing on the motion of defendant to suppress, an arresting officer testified that the arrest was made on the basis of information supplied by an informer, coupled with knowledge of defendant's prior history. Here, there was not an arrest merely for an exploratory search. According to the testimony, the police, based on the information they had, were actually looking for the defendant for the purpose of arresting him.

In the present case, the knowledge of the police was predicated partly on information furnished by an informer. This raises the constantly recurring question as to what extent officers may rely and act on that kind of information. Of course, to justify an arrest a police officer need not observe the actual commission of a crime, and it is a matter of common knowledge that law-enforcement officers frequently and necessarily act on information supplied by others and on occasion on "tips" coming from informers.

Did the court err in refusing to compel the disclosure of the name of the informer? Defendant contends that he was entitled to such disclosure to test the credibility of the informer and the reliability and sufficiency of the evidence on which the officers proceeded.

As already noted, law-enforcement officers sometimes base a part of their activities on information supplied them by informers, and the only way to verify the reliability of such information is to make use thereof. Informers often frequent the vicinity where crime is planned, and the revelation of an informer's name would not only destroy his access to information concerning criminal activities but might also result in his sudden demise, thereby discouraging others from becoming informers.

For many years, sound policy has dictated that the names [fol. 24] of informers be kept secret. Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. Here the officers acted on the information imparted by the informer plus additional knowledge already in their possession. The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated.

This case is distinguishable from that of *Roviaro* v. *United States*, 353 U. S., 53, 1 L. Ed. (2d), 639, 77 S. Ct., 623, where the informer not only gave information but took an active part personally in trapping and apprehending the offender. No such situation is evident here.

Finally, nothing in the present case shows that the disclosure of the name of the informer would have been of any real value to defendant. He made no active defense, and by stipulation the case was submitted to the court solely on evidence furnished by the police and introduced at the hearing on the motion to suppress.

We conclude that the search and seizure herein without a warrant was justifiable and did not violate defendant's constitutional rights, and we find no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

TAFT, C. J., and GIBSON, J., dissent.

GIBSON, J., dissenting. I concur with the majority that, under well established law, the search of defendant and the seizure of the packet of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. *Weeks* v. *United States* (1914), 232 U. S., 383, [fol. 25] 392; *United States* v. *Rabinowitz* (1950), 339 U. S., 56. But the validity of the search and seizure without a warrant after an arrest is dependent upon the arrest being valid.

Defendant was arrested without a warrant; hence, the inquiry must turn to whether such arrest was lawful. The Fourth Amendment to the Constitution of the United States and similar provisions of state constitutions, *e.g.*, Section 14, Article I, Ohio Constitution, do not prohibit arrest without a warrant. 6 Corpus Juris Secundum, 579, Arrest, Section 5. The right to arrest without a warrant turns upon (1) the nature of the offense, *i.e.*, whether felony or misdemeanor, and (2) the status of the arrestor, *i.e.*, whether peace officer or citizen. See Sections 2935.03 and 2935.04, Revised Code. In this instance the arrest was made by a police officer, so our inquiry is limited to the right of an officer to make an arrest without a warrant.

Since the rules governing an officer's right to arrest without a warrant vary with the nature of the crime, consideration should be given to whether the crime for which the arrest was made was a felony or a misdemeanor. The arresting officer testified that at 1:00 p. m. on November 10, 1961, he placed the defendant "under arrest for a clearing house operation, scheme of chance." On November 13, 1961, an affidavit was executed by a police officer charging defendant under Section 2915.111, Revised Code, with the

possession of a certain quantity of clearinghouse slips. The warrant issued thereon probably charged a violation of Section 2915.111, although the record is not entirely clear on this point, since the deputy clerk issuing the warrant apparently attempted to adapt a form charging a violation of the municipal code.

The arresting officer testified that when he arrested defendant he (the officer) was "under a belief that a felony had been committed under the state law, carrying on a scheme of chance is a felony." In my opinion, however, his conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good faith on the part of the arresting officer are not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony. 1 Harper and James, The Law of Torts, 275, Section 3.18.

[fol. 26] Several factors should be considered in determining whether the officer had reasonable grounds for believing that the defendant might be guilty of a felony. The factors include the statute which was violated and the circumstances existing at the time of the arrest and thereafter.

Consideration first should be given to the penalty provision of Section 2915.111, Revised Code, which reads as follows:

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years." It has been held that a crime which may be punishable by imprisonment in the penitentiary or in a jail at the discretion of the court is a felony. *McKelvy* v. *State* (1912), 87 Ohio St., 1, 7; *Seaman* v. *State* (1922), 106 Ohio St., 177, 179. It is to be noted, however, that in this case the court has no discretion. The statute clearly makes the first offense a misdemeanor and subsequent offenses felonies.

Consideration should also be given to the circumstances at the time of the defendant's arrest and thereafter. These

circumstances must be taken to be as stated by a single Cleveland police officer called to testify on the defendant's motion to suppress evidence, since as stated in the record there is no other evidence before this court. The officer testified that when he left the police station on November 10, 1961, he had a police picture of defendant, knew of three arrests of defendant in 1959 for clearinghouse operations,* had received information from an informer (whose [fol. 27] identity he would not reveal) and "had in mind looking for him [defendant] in the area of East 115th Street and Beulah." A few minutes before 1:00 that afternoon, he first saw defendant driving his automobile lawfully north on East 115th Street. The officer and other officers identified themselves and requested defendant to pull over to the curb as he turned east on Beulah. The officer admitted that defendant was not stopped for any traffic offense.

After defendant stopped, apparently the arresting officer and other officers searched his automobile. The arresting officer testified that while defendant's car was being searched, "I placed him [defendant] under arrest for a

---

* The majority opinion asserts that there was testimony that the defendant had previously been convicted of carrying on a scheme of chance involving clearinghouse slips. Although the arresting officer on direct examination testified that defendant had previous convictions, a careful examination of the testimony shows that he did not clearly indicate what the previous convictions were for. In view of what occurred after the arrest and search and seizure, the logical conclusion is that if the convictions were for clearing-house-slip violations they were convictions under the Cleveland Municipal Code and not under Section 2915.111, Revised Code. Had they been under the state statute, the prosecuting authorities undoubtedly would have taken advantage of the subsequent offense provision of the statute.

It also should be noted that the arresting officer on redirect examination testified as follows:

"Q. You indicated that you knew of Mr. Beck's previous record? A. Yes, I did.

"Q. What was that, sir? A. Three arrests for clearing house violations.

"Q. When was this? A. They were all during the year 1959, I believe."

clearing house operation, scheme of chance." This occurred at 1:00 p. m. on November 10, 1961. The officer also testified that the search of the automobile disclosed nothing other than a hunting knife. Defendant then was taken to the Fifth District Police Station where his person was searched. During this search an envelope of clearinghouse slips was found "beneath the sock of [*sic*] his leg."

Defendant was arraigned in the Cleveland Municipal Court on November 13, 1961, and entered a plea of not guilty. Thereafter on December 4, 1961, defendant filed a motion to suppress the policy slips seized and "all conversations after said illegal arrest," on the ground that the "arrest, search and seizure was without authority, unwarranted, illegal, unreasonable, unconstitutionally [*sic*] and void in that it violates the Fourth Amendment of the Constitution of the United States and the use of any property seized as alleged evidence infringes upon the privilege against self-incrimination, as guaranteed by the Fifth Amendment to the Constitution of the United States."

Following a hearing on the motion, which was denied, it was stipulated that the evidence presented on the motion would be the same as would be presented at the trial of the cause. The court thereupon found defendant guilty and he was sentenced to pay a fine of $500 and the costs.

[fols. 28-29] From the recital of facts surrounding the arrest and subsequent events, it is apparent that the opinion of the complaining witness, the police prosecutor and the Cleveland Municipal Court was that "a subsequent offense" does not exist so as to make an accused guilty of a felony unless the accused had earlier been convicted of violating Section 2915.111. In other words, the mere fact that defendant in this case may have been arrested on previous occasions for possible violations of Section 2915.111 did not make the arrest on November 10, 1961, one for a felony.

Notwithstanding the stated belief of the arresting officer, in view of the provisions of the statute under which the defendant was charged and circumstances existing at the time of his arrest and thereafter, it seems clear that the defendant was arrested in this case for a misdemeanor, the

validity of which arrest must be determined under Section 2935.03, Revised Code.

Consistent with the heading that "Officer may arrest on view," Section 2935.03, Revised Code, provides in pertinent part:

"A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal* corporation, until a warrant can be obtained." (Emphasis supplied.) Since Section 2935.04, Revised Code, is expressly limited to the right to arrest a felon without a warrant, it is obvious that the above-quoted statute states the rule relative to the right of named peace officers to arrest misdemeanants without warrants. In my opinion the phraseology "found violating a law of this state, or an ordinance of a municipal corporation" is the equivalent of the more usual rubric, viz., a "crime committed in the presence" of an officer.

As a rule, for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be revealed in the presence of the officer and the officer must perceive that the offense is being committed. The offense is committed in the presence or view of the officer when the officer receives knowledge of the commission of the offense through any of his senses, or by inferences properly to be drawn from the testimony of his senses. Accordingly, where through the sense of sight, or smell, or hearing, the officer receives knowledge that a misdemeanor is being committed in his presence he may arrest [fol. 30] the offender without a warrant. 6 Corpus Juris Secundum 580, 582, Arrest, Section 5.

In many types of crimes the suspect is actively doing something, such as breaking, entering, brandishing a knife, burning property, striking an antagonist, or using profane language, which the officer can see, hear, or smell. The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody or control of a packet of clearinghouse slips under his sock and inside his trousers. Obviously, the officer could neither see, hear nor smell the packet which was unlawfully possessed. In my opinion this misdemeanor was not committed

in the presence of the police officer, or, in the terms of the statute, the defendant was not "*found* violating a law of this state" by the officer, thereby justifying the arrest without a warrant.

To avoid any misunderstanding, I do not assert that the act of possessing contraband materials never can be committed in the presence of an officer. Obviously, if the officer were to see the clearinghouse slips in the hand of the suspect or enough of the slip protruding above a pocket of the suspect to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence.

The problem here is to strike a balance between the public interest in the prevention of crime and the speedy apprehension of criminals and the interest of the individual in freedom from interference at the hands of the law. Nothing I have said should be taken as condoning the activities of this defendant. But, regardless of the conduct of this defendant, I am firmly convinced that the due-process requirements of the common law and constitutional provisions are not to be overlooked. The court must protect the fundamental rights of its citizens even though in doing so the guilty may at times escape punishment. This is the price which a free society must pay to protect its freedom. We cannot ignore the rights of some of the people without doing violence to the rights of all.

There is no place today for a procedure by which a police officer can justify an arrest by the results of his unlawful search and seizure. In other words, an unlawful arrest may not be made legal by the contraband seized. The end cannot justify the means.

[fol. 31] Particularly important in the instant case are the facts that the courthouse was open and that the arresting officer, knowing that he was "looking for him [defendant] in the area of East 115th Street and Beulah," had ample time in which to secure a warrant. There is no indication that the arrest was made without a warrant in order to prevent a threatened escape.

Under all the circumstances of this case, I believe that the arrest was unlawful. Hence the search and seizure was unreasonable and in contravention of the Fourth Amend-

ment of the Constitution of the United States and Section 14, Article I of the Ohio Constitution. Accordingly, the ruling of *Mapp* v. *Ohio* (1961), 367 U. S., 643, requires that the judgment of the Court of Appeals in this case should be reversed and the cause remanded for further proceedings without the use of evidence obtained by the unlawful search and seizure.

Taft, C. J., concurs in the foregoing dissenting opinion.

[fol. 32]

IN THE SUPREME COURT OF OHIO

No. 37808

THE STATE OF OHIO, Appellee,

vs.

WILLIAM BECK.

Appeal from The Court of Appeals for Cuyahoga County.

JUDGMENT—June 26, 1963

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Cleveland Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

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IN THE SUPREME COURT OF OHIO

It is ordered by the Court that rehearing in this case is denied.

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[fol. 33]

SUPREME COURT OF THE UNITED STATES

No. 696, October Term, 1963

WILLIAM BECK, Petitioner,

vs.

OHIO.

ORDER ALLOWING CERTIORARI—February 17, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted].

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. ---------.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petitioner, William Beck, prays that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio made and entered by said Court on the 26th day of June, 1963, a copy of which is attached hereto as Appendix I. (Rehearing denied on the 25th day of September, 1963, which order is appended hereto as Appendix II.)

OPINIONS OF THE COURT BELOW.

No opinion was rendered by the Trial Court, other than a mere determination of guilt. The Ohio Court of Appeals upon consideration of an appeal to it likewise did not render either an official or unofficial opinion, save a mere journal entry affirming the judgment of the Trial Court. (See Appendix III.)

The Supreme Court of Ohio after a consideration of the merits affirmed the judgments of the lower courts. The formal opinion announced by the Supreme Court of Ohio, with two Judges dissenting, was officially published in 175 Ohio St. 73 (1963), and is incorporated herein as Appendix IV.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., § 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW.

I.

Can probable cause for an arrest without a warrant be established by a policeman's testimony that he received a tip from an unnamed and unidentified informer when the defense's demand for disclosure is denied?

II.

Can a state, consistent with the constitution, refuse to require the disclosure of an alleged informer where the existence of probable cause is predicated on information supposedly supplied by such informer?

III.

In making the substantive determination of the reasonableness of a warrantless arrest or search can a state court arbitrarily accept as conclusive the subjective judgment of police officers on the issue of the existence and reliability of an unnamed and unidentified informer?

IV.

Even where there has been a lawful arrest, is the incidental search of the person of the accused without a warrant limited to safeguarding the arrest and the arresting officer?

V.

Is a crime committed in the presence of an officer so as to justify an arrest without a warrant, when the gravamen of such offense is the possession of contraband, which is completely concealed from the officer's view and which is a fact he could not have known prior to the search?

VI.

Where there is time to procure an arrest or search warrant, is any warrantless arrest and search "unreasonable" so as to constitute a violation of the Fourth and the Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATEMENT OF THE CASE.

William Beck, the Petitioner, was charged and convicted of a violation of Revised Code of Ohio, § 2951.111, wherein it was charged that on the 10th day of November, 1961, he had in his possession or under his control, certain illegal gambling slips. Prior to trial the Petitioner moved to suppress certain evidence, which evidence, it was alleged, had been seized in violation of the constitutional prohibition against illegal searches and seizures. Also, it was contended that the use of such evidence seized in violation of the constitution "is by that same authority inadmissible in a state court." This Motion, following a full hearing was denied, and on the merits the judgment herein being challenged was rendered. Petitioner was then sentenced.

In due season, Petitioner appealed this cause: first, to the Ohio Court of Appeals, which merely affirmed this judgment without any discussion. Next, upon its consid-

eration on the merits, the Supreme Court of Ohio affirmed this conviction and later denied a rehearing.

I.

The transcript of the trial evidence, hereinafter referred to as (R), shows as follows:

To support the allegations made in the written Motion to Suppress, the defense gave evidence through Sergeant Carl Delau one of the arresting officers. This officer testified that he was a member of the Cleveland Police Department and that at about 1:00 p.m. on the 19th day of November, 1961, while in the company of several other officers, they stopped Beck shortly after he had turned east from East 115th Street onto Beulah Avenue. The Sergeant further related that they (the officers) did not stop him for any traffic offense. As the Sergeant phrased it "I identified myself and requested him to pull over to the curb". (R. 5). Further testimony was in response to these direct questions:

> "Q. Then you searched his automobile.
>
> A. Yes, I did.
>
> Q. Prior to that, did you indicate to him that he was under arrest?
>
> A. Not while searching the automobile." (R. 5).

The search conducted of Petitioner and his car at that time was not productive of any of the fruits of illegality. However, despite this abortive exploratory search, William Beck was placed under arrest. In this regard the following excerpt of testimony is significant:

> "Q. Why then did you place him under arrest?
>
> A. I placed him under arrest for a clearinghouse operation, scheme of chance.
>
> Q. At that time, you had discovered some evidence of a scheme of chance?

A. I did not.

Q. At the time you placed him under arrest, you did not have any evidence?

A. Other than information.

Q. In other words, you heard rumors?

A. I heard reports and found that he has a record in connection with clearinghouse and scheme of chance.

Q. Previous convictions?

A. Yes.

Q. On this information, you arrested him on the City streets?

A. On Beulah Avenue.

Q. And you searched the automobile?

A. Yes.

Q. Did you find anything as a result of that search?

A. No.

Q. Then what did you do?

A. I conveyed him to the Fifth District, where we searched him.

Q. In other words, you didn't find anything as a result of your search of the automobile?

A. That is correct.

Q. Then he was transported to the Fifth District Station, which is on Chester Avenue?

A. 107th and Chester.

Q. At 107th and Chester, you then searched Mr. Beck?

A. I did.

Q. Prior to your searching of Mr. Beck, he was under arrest?

A. Yes, he was." (R. 6-7.)

II.

Suffice it to say, their search of William Beck at the District Station revealed, secreted in his clothes, some illegal clearinghouse slips.

With regard to the officer's testimony that he had "information," he was specifically asked: "From whom did you get this information?" The response was "I couldn't divulge that information" (R. 11). Counsel for the Petitioner then made a strong argument for the disclosure of the sought for information. The Court after first reserving its ruling on this request that the Court order the witness to answer the question, ruled: "I am not going to order the patrolman to testify as to the name of the informer on the grounds of irrelevancy" (R. 15).

Concerning this latter ruling by the Court, it followed this specific question by the Court:

> "The Court: I have a question officer. When you placed this man under arrest did you place him under arrest for a felony or a belief that a felony had been committed?
>
> The Witness: Under a belief that a felony had been committed, under State law, carrying on a scheme of chance is a felony, on that basis, I arrested him." (R. 14.)

III.

In its opinion the Supreme Court of Ohio ruled: in effect, that in moving to suppress unconstitutionally seized evidence an accused is not making a defense against the charge lodged against him. Thus the Court held:

> "It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him." *State vs. Beck*, 175 Ohio St. 73 (1963).

As regards the existence of probable cause for an arrest without a warrant (and presumably for the issu-

ance of a warrant), according to the challenged authority of this opinion, the police in Ohio are to be delegated the power to justify, with impunity, their own illegal acts by resort even to a fictional or phantom informer as the supplier of requisite probable cause. This is so because, under the Ohio Rule, the mere statement by an officer that such informer exists or gave reliable information is not subject to dispute. Not only this, but such statement is entitled to be viewed, as was done by the Supreme Court of Ohio, as conclusive on the question of: the honesty of the belief of the arresting officer; the reliability of his "informer"; the reasonableness of his reliance on the information supposedly supplied; the existence of probable cause and their right to arrest without a warrant.

Consider in this latter regard, the following holding by the Supreme Court of Ohio in their disposition of this appeal:

> "All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles." Id., 175 Ohio St., at 73.

The dissenting opinion took the position, consistent with numerous pronouncements from this Court that the validity of the search and seizure without a warrant after an arrest is dependent upon the arrest being valid. Id., 175 Ohio St., at 78. Also, it was cogently argued by the dissentors, that: the officer's "conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good faith on the part of the arresting

officer is not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony." Ibid.

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial Petitioner filed a Motion to Suppress the evidence on the ground that his arrest and subsequent search were illegal and unconstitutional. Further that the search conducted was general and/or exploratory and that the use of any evidence so seized infringed on Petitioner's constitutional rights under the Fourth and Fifth Amendments of the United States Constitution.

These issues were further briefed and argued in the trial court, the Ohio Court of Appeals, and the Supreme Court of Ohio. The Supreme Court of Ohio in its formal opinion discussed some of the issues raised therein, and in deciding the merits specifically held that "the search herein without a warrant was justifiable and did not violate * * * [Petitioner's] constitutional rights, and we find no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer." Id., 175 Ohio St., at 77.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The specific question raised by Petitioner's Motion to Suppress was essentially this: was the arrest of the Petitioner and the search of his person legal? If in fact the evidence sought to be suppressed by the Motion was obtained by an illegal search and seizure, it is not admissible over objections, by reason of the constitutional guarantees against illegal searches and seizures (invasion of privacy)

and/or against self incrimination. *Mapp vs. Ohio*, 367 U. S. 643 (1961).

In resolving the question of legality we start with the premise that: The Fourth Amendment to the United States Constitution does not permit the stopping of an individual operating a motor vehicle on a public street, detention of said individual, search of the vehicle, physical deprivation of liberty without probable cause. *Henry vs. United States*, 361 U. S. 98 (1959). And facts developed after the arrest of an individual will not justify or give validity to the act of arresting, this is so even when the items discovered prove to be of a contraband nature. *United States vs. Jeffers*, 342 U. S. 49 (1951). A search is reasonable as an incident to an arrest only if the arrest is lawful. *United States vs. DiRe*, 332 U. S. 581 (1948).

On the other hand, an incidental search is, as the term implies, incident to the arrest. The primary purpose being the arrest with the search purely incidental. An exploratory search, such as was consummated here, is one in which the search is the primary object and the arrest is used as a pretext to justify the search. In these cases, the search is exploratory and for that reason "unreasonable," and being unreasonable is absolutely prohibited by the constitution.

In this cause the officer merely claimed that he saw the Petitioner in a certain vicinity and arrested him on sight, for as he stated, a felony. Why this was an obvious tactic, cleverly designed, to circumvent the law will be easily exposed by the objective consideration surely to be given our cause.

It is our contention, despite testimony of the officer that the arrest followed the search of the car, that the arrest occurred at the point the car was stopped. Now, the significance of the moment of arrest is based on the principles of the Fourth Amendment, which defines the

rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The search of Beck was ruled by Trial Judge to be incident to his arrest (R. 15, 16). The essential question then is: Did probable cause exist for the arrest of William Beck without a warrant?

The undisputed evidence was that the detectives curbed Beck's car and immediately commenced to search it, later taking him to the station where a more thorough search of his person was conducted which disclosed the contraband. If the arrest was not proper the subsequent finding of this evidence could not make it good. Surely, the officer is not to be permitted to justify the arrest by the search and at the same time justify the search by the arrest. This "Boot-Strap" argument has been expressly condemned. See *McDonald vs. U. S.*, 335 U. S. 451 (1948); *Johnson vs. U. S.*, 333 U. S. 10, 16-17 (1947).

Also, and most assuredly, the detectives in calling upon Beck to stop did so by virtue of their official position. This compulsion exercised by the officers then and there, in depriving him of his freedom of proceeding along a public street constituted an arrest. Again, if probable cause did not exist prior to finding the illegal slips, the search cannot be sanctioned; notwithstanding, the contrary view expressed by the Supreme Court of Ohio below.

WHERE AN ARREST IS NOT EXPRESSLY SANCTIONED BY STATUTE, THE ARREST IS UNLAWFUL AND THE INCIDENTAL SEARCH UNREASONABLE.

With a valid warrant, a police officer can arrest for a felony or a misdemeanor. It makes no difference whether or not the crime is committed in his presence. Probable cause in such instances is predetermined or at least should have been. Article IV, U. S. Constitution; R. C. of Ohio, § 2933.22.

The method and time of executing an arrest warrant are set forth in our statute, R. C. of Ohio, § 2935.12, compliance to which is mandatory. On the other hand, many incidental searches, in all other respects reasonable, have been held "unlawful" for failure to comply with the provisions concerning notification to arrestee of purpose and authority. *Miller vs. U. S.*, 357 U. S. 301 (1958).

In Ohio, as elsewhere, a police officer may arrest for any crime, felony or misdemeanor committed in his presence. Revised Code of Ohio, § 2935.03. This right to arrest for a crime not committed in the presence of the police officer is strictly limited for the protection of the public. Thus, a police officer may never arrest for a misdemeanor not committed in his presence. Every such arrest is invalid as is every incidental search.

Our statutes in Ohio also specify when and how a warrantless arrest may be made for crimes not committed in view of an officer. Accordingly, Revised Code of Ohio, § 2935.04 provides in substance that: when a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of such offense, and detain him until a warrant can be obtained. 5 *Ohio Jur.* (2d), Arrest, § 25, pp. 38-39.

To sum up, if the crime is committed in the presence of the police officer he may arrest without a warrant for felonies or misdemeanors. When not committed in his presence, he may make such arrest only if he has probable cause to believe a felony has been committed and probable cause to believe the person arrested committed it. If the arrest is not expressly sanctioned by statutes, the arrest

is unlawful and as a consequence the incidental search unreasonable.

Basically the concept is that no search can ever be made without a search warrant. The only exception, other than waiver or consent, is the search incident to lawful arrest. The real test should always be whether information possessed by the police officer, from personal observation, or from hitherto reliable informants would be sufficient to justify the issuance of a warrant of arrest by a neutral magistrate.

Next, these statutes also provide that persons arrested without a warrant shall be informed of the cause of their arrest. Revised Code of Ohio, § 2935.07. Cf., *Miller v. United States,* cited above. Suffice it to say there is little uncertainty, at least, in this area of the substantive law of searches and seizures. There must be probable cause to make the arrest and there must be a statutory right to arrest. Compliance with these statutes is mandatory and if the arrest is unlawful, the incidental search is unreasonable and the product of such search is not admissible in evidence to convict.

Based on these principles alone, it is apparent that the arrest of this Petitioner cannot pass muster. First, there was no probable cause for the arrest. Next, no crime was committed in the presence of the officer and there was no reasonable ground to believe the felony particularized (and any other felony) was involved. Further, Beck was not informed of the cause of his arrest. Not only this but if this search, conducted under such a frame of reference, is not proper to be designated exploratory, it would be most difficult to even conjure up hypothetically a suitable fact situation for purposes of illustration.

A SEARCH WHICH IS UNREASONABLE FOR A WANT OF PROBABLE CAUSE CANNOT BE MADE REASONABLE BY WHAT THE SEARCH UNCOVERS.

Perhaps the greatest source of difficulty in this whole area of searches and seizures involves a search made without a warrant and, as was done here, pursuant to an arrest without an arrest warrant. Such an arrest is valid (if it is, so is the ensuing search) if it is for a misdemeanor committed in the officers' presence, or when based upon the reasonable grounds relative to a felony as argued above. Cf., *Draper v. United States*, 358 U. S. 307 (1959).

Our problem, however, has to a degree been delimited by the arresting officers' conclusion, adopted by the Supreme Court of Ohio in its opinion, that the arrest for Beck was for a "felony," which the officer stated he believed had been committed by William Beck.

Concededly, it is unnecessary to have evidence sufficient to convict in order to have probable cause for search, seizure or arrest. *Carroll vs. United States*, 267 U. S. 132, 161-162 (1955). The crucial inquiry is whether there was probable cause to believe the "felony" referred to by the officer had been committed. See, Revised Code of Ohio, § 2951.13.

A. When the Identity and Existence of an Allegedly Reliable Informer Is Material to the Establishment of Probable Cause, the Court Must Require Disclosure.

Sergeant Delau (the arresting officer) in his evidence attempted to justify his actions on the basis of "confidential information" that had allegedly been given him (R. 6, 12). Now, the rule that an informer's tip may supply "probable cause" for an arrest or search must be regarded as subject to numerous exceptions and qualifications. *Jones vs. United States*, 362 U. S. 257 (1960); *Draper vs. United*

States, cited above. The narrow purview of our discussion at this juncture is concerned not only with the propriety of the Trial Judges ruling against disclosure; but also the announced view of the Ohio Supreme Court which is in obvious conflict with the supreme law of the land as enunciated by this Court.

At the outset, it should be understood that Ohio does not have a statutory privilege of confidentiality as between the policeman and an informer. Revised Code of Ohio, § 2317.02. Moreover, the Supreme Court of Ohio has expressly held that "* * * a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision." *In Re Story*, 159 Ohio St. 144 (1953). It would thus seem to follow from a bare reading of this privilege statute, which does not confer any status to the policeman-informer relation, that the mere invocation of the doctrine of "expressio unius est exclusio alterius" should have been determinative.

Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have the issues raised by his defense properly determined.

The constitutions of both the State and Federal Government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in Ohio's Revised Code, § 2933.22. In this regard one of the prime issues raised by our Motion was the alleged nonexistence of probable cause. Certainly in this

posture the reliability of the informant, the credibility of the police officer who acted upon the information disclosed, and the soundness of the reason for reliance upon the information are proper matters for exploration by the defense. Thus an accused is entitled to know the identity of the informer, to compel his testimony and then impeach his credibility. *Roviaro vs. United States*, 353 U. S. 53 (1957).

Moreover, where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require such persons' identity disclosed should render the search unlawful and require that evidence obtained from the search and seizure be excluded. See, *United States vs. Blich*, 45 Fed. (2d) 627 (1932, D. C. Wyo), where the District Court ruled that the existence of probable cause could only be properly determined if the identity of the informer were disclosed.

Whether or not the arrest being assailed in this cause was legally done, of course, depends upon constitutional standards. *Ker vs. California*, 374 U. S. 23 (1963). The exact nature of these standards presents a judicial question. And although police officers often feel they have a well-grounded suspicion of a certain person's activities, the test as to whether or not any person's right to privacy can be traversed is of no mean significance. History has of course demonstrated that the zeal of our police, in the great state of Ohio, does not always conform to constitutional standards: *Mapp vs. Ohio*, 81 S. Ct. 1684 (1961), *Haley vs. Ohio*, 332 U. S. 596 (1958).

The word of an informer can supply "probable cause" for an arrest or search in certain qualified instances. The test, as presently stated by this Court in *Draper vs. United*

States, 358 U. S. 307 (1959), seems to support the view that what is observed must jibe with what an informer told him would occur. Further the informer must be reliable; in that, "an uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause." *Contee vs. United States*, 215 Fed. (2d) 324, 327 (1954). Cf., *Worthington vs. United States*, 166 Fed. (2d) 557, 566 (6th Cir. 1948), where the Court ruled:

> "In this case, the officers assumed that some denizen of the underworld was betraying appellant. They did not know who the enemy was, but they decided they would act on the anonymous information given, and that they would arrest appellant and search her home if they found nothing, it was probably assumed that appellant did not have enough standing in her community to question their unlawful conduct."

By the Court not requiring disclosure the status of this alleged confidential source became reduced to an anonymity. Certainly if identity were disclosed the defense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. *Wong Sun vs. United States*, 371 U. S. 471 (1963). Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge. *People vs. Robinson*, 166 Cal. App. 416 (1958).

In the final analysis, the conviction herein being challenged must stand or fall on the determination whether there was probable cause for the arrest, which in turn de-

pends upon not only the existence of an informer but his reliability. By denying the request for disclosure, the right to test the reasonableness of the officers conduct (including but not limited to the reasonableness of his reliance on such informer) was thereby frustrated. The real fault characteristic, in addition to foreclosing even the possibility of a rational appraisal by the Court, is that such procedure permits the policeman to conclusively determine the validity of his own arrest. Why such an approach is not consistent with the constitutional standards developed by this Court is obvious.

In our view the cogent arguments in favor of disclosure are most compelling. Consider, in this regard, the view expressed in *Jones vs. United States*, 271 Fed. (2d) 494, 499 (App. D. C. 1959) where the rule was stated:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from the informer, that his identity be divulged, so that his reliability may be subjected to a meaningful judicial scrutiny rather than accepted on a policeman's word."

Likewise, in *Priestly vs. Superior Court*, 50 Cal. (2) 812, 818 (1958), the California Supreme Court similarly ruled:

> "If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

B. Probable Cause to Arrest Without a Warrant Is a Judicial Question of Fact and Exists Only When the Circumstances Justify the Reasonable Belief That a Felony Has Been or Was Being Committed.

I.

Even if we assume that the Ohio Courts were correct in their rulings denying disclosure, and with this "so called informer" remaining anonymous, if he does exist, still the evidence discloses nothing to justify the original arrest. Moreover, even following the search of Beck's person, which proved fruitful, the ultimate charge lodged against him was a misdemeanor (that is, a charge based on simple possession of the contraband slips, Revised Code of Ohio § 2951.111). This charge is distinguishable from the felony charge for which the officer testified he arrested the Petitioner; i.e., for Carrying on a Scheme of Chance. Revised Code of Ohio, § 2951.13.

II.

The most often quoted statement in the arguments against the quest for suppression of evidence is that the constitution does not prohibit all searches, only those that are unreasonable. And, although it is only on the rarest of occasions that the State Court Prosecutors will not try to justify even obviously illegal police intrusion on the rights of an accused, the law is that State Courts are required to use the proper standards of reasonableness. See, *Ker v. California*, 374 U. S. 23, at page 33.

In determining the issue of reasonableness, where as here, the facts and circumstances established that there was sufficient opportunity to obtain a warrant, can there be any question but that a failure to do so will render an ensuing search unreasonable. A limited exception to this

rule is operative where exigent circumstances justify an officer proceeding without the warrant. *Johnson vs. United States*, 333 U. S. 10 (1947).

Here, however, the officer categorically stated that when he left the police station, on the day of Beck's arrest, he intended to arrest him and was later in the vicinity for that purpose. Stated simply, these officers knew in advance that they were going to arrest Beck, at least the Sergeant so testified What excuse then could justify their failure to obtain an arrest warrant; provided, they could qualify for one. Surely if they could not so qualify, they should not have made the arrest and/or search. However, the fact that they did not even seek a warrant must give rise to the cogent inference that their reason for not doing so was because they knew that on the sparse facts available to them, if they had any, no neutral and detached magistrate would have issued an arrest warrant based on a violation of Revised Code of Ohio, § 2951.12. C. F., *e.g.*, *Giodenello vs. United States*, 357 U. S. 480 (1958).

In this regard, it is also our contention that this failure to even seek a warrant is most significant. This is so when viewed, not only from the posture that the officers could not qualify for the issuance of one, but also, when considering these facts and circumstances as just another example of law enforcement by the Cleveland Police in general and Sergeant (now Lieutenant) Delau in particular. See concurring opinion of Mr. Justice Douglas in *Mapp vs. Ohio*, 367 U. S. 643, at page 671, where it was stated, and rightly so, that the facts of *Mapp* show as would few other cases: "The casual arrogance of those who have untrammelled power * * *.

It may be enough to say that this same officer was the prime arresting officer in the *Mapp* case, and the conduct described in that case, as having been in defiance of the

law, was and is typical of his methods in particular and the Cleveland Police in general.

CONCLUSION.

Where defects in methods employed by over zealous police, to bring about the conviction of an accused are assailed, it does pose difficult problems for any judiciary. Should the Court ignore the methods utilized or should the Courts exclude such evidence when it is obtained as a product of an illegal police intrusion. The die has been cast and the view now adopted was most elegantly expressed in *People vs. Cahan*, 44 Cal. (2d) 434 (1955). There the Court wrote:

> "It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law *** *. Moreover any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the concept of ordered liberty."

Therefore, upon an objective analysis of this cause, we are left with an arrest without probable cause and without a warrant. In addition to this we have a willful failure by the Police to submit to any magistrate the question of the sufficiency of the facts within their knowledge or which they assertedly had reasonable and trustworthy information. All of which, the officer claimed, constituted the predicate for his belief that the arrest of Beck was properly indicated for the stated felony.

Also, and as a direct consequence of the Ohio Court's apparent unwillingness to vindicate those rights restored to Ohio citizens by *Mapp*, there is this revolutionary Ohio rule, announced by our Supreme Court, to the effect that:

the testimony of police officers as to the existence of probable cause and the reliability of an informer is not only conclusive but determinative of those issues.

There is, thus evolved, the query as to whether or not this Court should agree with the Supreme Court of Ohio that it takes less evidence in our State to arrest and search without a warrant than it apparently takes to get one. *City of Akron vs. Williams*, 175 Ohio St. 186 (1963) and *State v. Watson*, 117 Ohio App. 333 (1962).

In *State vs. Watson* (cited above), the Court of Appeals in a case where there was a search warrant held that:

> "An affidavit for a search warrant which states that complainant 'has knowledge from a reliable source' that the things to be searched for are kept in a specified building or buildings, but does not state the facts upon which his belief that contraband goods are there concealed is based, does not comply with the mandatory provisions of § 2933.23, Revised Code."

It is of course true that the revolutionary rule stated by the Ohio Supreme Court does establish a dangerous precedent. Further, such a view should not be countenanced by any implied stamp of approval, which would necessarily flow from a failure by this Court to agree to hear this matter on its merits. This is a particularly disturbing thought when one realizes that if this cause is heard on its merits the conviction and the Ohio rule would both be disapproved.

It is therefore respectfully requested that a writ of certiorari be issued under the seal of this Court to the Supreme Court of Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

JAY B. WHITE,
Attorney for Petitioner.

JAMES R. WILLIS,
Of Counsel.

APPENDIX I.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS (NO. 37808).

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed.

Date: 6/26/63

APPENDIX II.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING APPLICATION FOR REHEARING (37808).

It is ordered by the Court that rehearing in this case is denied.

Date: 9/25/63.

APPENDIX III.

JOURNAL ENTRY, COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, COUNTY OF CUYAHOGA (No. 25890).

July 12, 1962.

This cause came on to be heard on the appeal on questions of law from the judgment of Cleveland Muncipal Court and was argued by counsel for both parties; and upon consideration, the Court finds no error prejudicial to the Appellant, and, therefore, the judgment of Cleveland Municipal Court is affirmed and it is ordered that Appellee recover of Appellant its costs herein taxed.

The Court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing Cleveland Municipal Court to carry this judgment into execution.

APPENDIX IV.

OPINION OF THE SUPREME COURT OF OHIO.

ZIMMERMAN, *J.* Section 2915.111, Revised Code, recites:

> "No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.
>
> "Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. *Ex parte Thorpe*, 66 Ohio App., 128, 32 N. E. (2d), 571, affirmed, 137 Ohio St., 325, 30 N. E. (2d), 335. See, also, *In re Thorpe*, 132 Ohio St., 119, 5 N. E. (2d), 333, and *Smith v. Alvis, Warden*, 72 Ohio Law Abs., 267, 268, 134 N. E. (2d), 868, 869.

The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped the car and searched it, without result. Defendant was then arrested and taken to a police station, and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction.

In response to questions asked him by counsel for the defendant, one of the arresting officers testified as follows:

> "A. I heard reports and found that he [defendant] had a record in connection with clearing house and scheme of chance.
>
> "Q. Previous convictions? A. Yes."

Although there are a number of errors assigned by defendant, only two are of real importance:

1. Were the clearinghouse slips obtained by illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2. Did the trial court err in refusing to order the police to disclose the identity of the informer?

The search herein took place as an incident of an arrest, and it has been held that a search which is incidental to a valid arrest does not constitute an unreasonable and illegal search. *Harris v. United States,* 331 U. S., 145, 91 L. Ed., 1399, 67 S. Ct., 1098.

Defendant was arrested, without a warrant, for what an arresting officer believed and had probable cause to be-

lieve was the commission of a felony (Section 2915.111, Revised Code). In the circumstances, then, was such arrest valid? Section 2935.04, Revised Code, describes when an arrest may be made without a warrant and reads as follows:

> "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Next, was there probable cause for making the arrest? "Probable cause" is incapable of any exact definition applicable to all cases. However, the Supreme Court of the United States said in *Henry v. United States*, 361 U. S., 98, 102, 4 L. Ed. (2d), 134, 80 S. Ct., 168:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." See, also, *Draper v. United States*, 358 U. S., 307, 3 L. Ed. (2d), 327, 79 S. Ct., 329.

Therefore, a question of fact is presented in each case, and where the facts in the possession of the police are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and that the accused committed it, probable cause is present.

In the hearing on the motion of defendant to suppress, an arresting officer testified that the arrest was made on the basis of information supplied by an informer, coupled with knowledge of defendant's prior history. Here, there was not an arrest merely for an exploratory search. According to the testimony, the police, based on the information they had, were actually looking for the defendant for the purpose of arresting him.

In the present case, the knowledge of the police was predicated partly on information furnished by an informer. This raises the constantly recurring question as to what extent officers may rely and act on that kind of information. Of course, to justify an arrest a police officer need not observe the actual commission of a crime, and it is a matter of common knowledge that law-enforcement officers frequently and necessarily act on information supplied by others and on occasion on "tips" coming from informers.

Did the court err in refusing to compel the disclosure of the name of the informer? Defendant contends that he was entitled to such disclosure to test the credibility of the informer and the reliability and sufficiency of the evidence on which the officers proceeded.

As already noted, law-enforcement officers sometimes base a part of their activities on information supplied them by informers, and the only way to verify the reliability of such information is to make use thereof. Informers often frequent the vicinity where crime is planned, and the revelation of an informer's name would not only destroy his access to information concerning criminal activities but might also result in his sudden demise, thereby discouraging others from becoming informers.

For many years, sound policy has dictated that the names of informers be kept secret. Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. Here the officers acted on the information imparted by the informer plus additional knowledge already in their possession. The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated.

This case is distinguishable from that of *Roviaro v. United States*, 353 U. S., 53, 1 L. Ed. (2d), 639, 77 S. Ct., 623, where the informer not only gave information but took an active part personally in trapping and apprehending the offender. No such situation is evident here.

Finally, nothing in the present case shows that the disclosure of the name of the informer would have been of any real value to defendant. He made no active defense, and by stipulation the case was submitted to the court solely on evidence furnished by the police and introduced at the hearing on the motion to suppress.

We conclude that the search and seizure herein without a warrant was justifiable and did not violate defendant's constitutional rights, and we find no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

TAFT, C. J., and GIBSON, J., dissent.

GIBSON, J., dissenting. I concur with the majority that, under well established law, the search of defendant and the seizure of the packet of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. *Weeks v. United States* (1914), 232 U. S., 383, 392; *United States v. Rabinowitz* (1950), 339 U. S., 56. But the validity of the search and seizure without a warrant after an arrest is dependent upon the arrest being valid.

Defendant was arrested without a warrant; hence, the inquiry must turn to whether such arrest was lawful. The Fourth Amendment to the Constitution of the United States and similar provisions of state constitutions, *e. g.*, Section 14, Article I, Ohio Constitution, do not prohibit arrest without a warrant. 6 Corpus Juris Secundum, 579, Arrest, Section 5. The right to arrest without a warrant turns upon (1) the nature of the offense, *i. e.*, whether felony or misdemeanor, and (2) the status of the arrestor, *i. e.*, whether peace officer or citizen. See Sections 2935.03 and 2935.04, Revised Code. In this instance the arrest was made by a police officer, so our inquiry is limited to the right of an officer to make an arrest without a warrant.

Since the rules governing an officer's right to arrest without a warrant vary with the nature of the crime, consideration should be given to whether the crime for which the arrest was made was a felony or a misdemeanor. The arresting officer testified that at 1:00 p. m. on November 10, 1961, he placed the defendant "under arrest for a clearing house operation, scheme of chance." On November 13, 1961, an affidavit was executed by a police officer charging defendant under Section 2915.111, Revised Code, with the possession of a certain quantity of clearinghouse slips. The warrant issued thereon probably charged a violation of Section 2915.111, although the record is not entirely clear on this point, since the deputy clerk issuing the warrant apparently attempted to adapt a form charging a violation of the municipal code.

The arresting officer testified that when he arrested defendant he (the officer) was "under a belief that a felony had been committed under the state law, carrying on a scheme of chance is a felony." In my opinion, however, his conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good

faith on the part of the arresting officer are not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony. I *Harper and James, The Law of Torts*, 275, Section 3.18.

Several factors should be considered in determining whether the officer had reasonable grounds for believing that the defendant might be guilty of a felony. The factors include the statute which was violated and the circumstances existing at the time of the arrest and thereafter.

Consideration first should be given to the penalty provision of Section 2915.111, Revised Code, which reads as follows:

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years." It has been held that a crime which may be punishable by imprisonment in the penitentiary or in a jail at the discretion of the court is a felony. *McKelvey v. State* (1912), 87 Ohio St., 1, 7; *Seaman v. State* (1922), 106 Ohio St., 177, 179. It is to be noted, however, that in this case the court has no discretion. The statute clearly makes the first offense a misdemeanor and subsequent offenses felonies.

Consideration should also be given to the circumstances at the time of the defendant's arrest and thereafter. These circumstances must be taken to be as stated by a single Cleveland police officer called to testify on the defendant's motion to suppress evidence, since as stated in the record there is no other evidence before this court. The officer testified that when he left the police station on

November 10, 1961, he had a police picture of defendant, knew of three arrests of defendant in 1959 for clearing-house operations,* had received information from an informer (whose identity he would not reveal) and "had in mind looking for him [defendant] in the area of East 115th Street and Beulah." A few minutes before 1:00 that afternoon, he first saw defendant driving his automobile lawfully north on East 115th Street. The officer and other officers identified themselves and requested defendant to pull over to the curb as he turned east on Beulah. The officer admitted that defendant was not stopped for any traffic offense.

After defendant stopped, apparently the arresting officer and other officers searched his automobile. The arresting officer testified that while defendant's car was being searched, "I placed him [defendant] under arrest for a clearing house operation, scheme of chance." This occurred at 1:00 p.m. on November 10, 1961. The officer

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* The majority opinion asserts that there was testimony that the defendant had previously been convicted of carrying on a scheme of chance involving clearinghouse slips. Although the arresting officer on direct examination testified that defendant had previous convictions, a careful examination of the testimony shows that he did not clearly indicate what the previous convictions were for. In view of what occurred after the arrest and search and seizure, the logical conclusion is that if the convictions were for clearinghouse-slip violations they were convictions under the Cleveland Municipal Code and not under Section 2915.111, Revised Code. Had they been under the state statute, the prosecuting authorities undoubtedly would have taken advantage of the subsequent offense provision of the statute.

It also should be noted that the arresting officer on redirect examination testified as follows:

"Q. You indicated that you knew of Mr. Beck's previous record? A. Yes, I did.

"Q. What was that, sir? A. Three arrests for clearing house violations.

"Q. When was this? A. They were all during the year 1959, I believe."

also testified that the search of the automobile disclosed nothing other than a hunting knife. Defendant then was taken to the Fifth District Police Station where his person was searched. During this search an envelope of clearing-house slips was found "beneath the sock of [*sic*] his leg."

Defendant was arraigned in the Cleveland Municipal Court on November 13, 1961, and entered a plea of not guilty. Thereafter on December 4, 1961, defendant filed a motion to suppress the policy slips seized and "all conversations after said illegal arrest," on the ground that the "arrest, search and seizure was without authority, unwarranted, illegal, unreasonable, unconstitutionally [*sic*] and void in that it violates the Fourth Amendment of the Constitution of the United States and the use of any property seized as alleged evidence infringes upon the privilege against self-incrimination, as guaranteed by the Fifth Amendment to the Constitution of the United States."

Following a hearing on the motion, which was denied, it was stipulated that the evidence presented on the motion would be the same as would be presented at the trial of the cause. The court thereupon found defendant guilty and he was sentenced to pay a fine of $500 and the costs.

From the recital of facts surrounding the arrest and subsequent events, it is apparent that the opinion of the complaining witness, the police prosecutor and the Cleveland Municipal Court was that "a subsequent offense" does not exist so as to make an accused guilty of a felony unless the accused had earlier been convicted of violating Section 2915.111. In other words, the mere fact that defendant in this case may have been arrested on previous occasions for possible violations of Section 2915.111 did not make the arrest on November 10, 1961, one for a felony.

Notwithstanding the stated belief of the arresting officer, in view of the provisions of the statute under which the defendant was charged and circumstances existing at the time of his arrest and thereafter, it seems clear that the defendant was arrested in this case for a misdemeanor, the validity of which arrest must be determined under Section 2935.03, Revised Code.

Consistent with the heading that "Officer may arrest on view," Section 2935.03, Revised Code, provides in pertinent part:

"A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal* corporation, until a warrant can be obtained." (Emphasis supplied.) Since Section 2935.04, Revised Code, is expressly limited to the right to arrest a felon without a warrant, it is obvious that the above-quoted statute states the rule relative to the right of named peace officers to arrest misdemeanants without warrants. In my opinion the phraseology "found violating a law of this state, or an ordinance of a municipal corporation" is the equivalent of the more usual rubric, viz., a "crime committed in the presence" of an officer.

As a rule, for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be revealed in the presence of the officer and the officer must perceive that the offense is being committed. The offense is committed in the presence or view of the officer when the officer receives knowledge of the commission of the offense through any of his senses, or by inferences properly to be drawn from the testimony of his senses. Accordingly, where through the sense of sight, or smell, or hearing, the officer receives knowledge that a misdemeanor is being committed in his presence he may

arrest the offender without a warrant. 6 Corpus Juris Secundum 580, 582, Arrest, Section 5.

In many types of crimes the suspect is actively doing something, such as breaking, entering, brandishing a knife, burning property, striking an antagonist, or using profane language, which the officer can see, hear, or smell. The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody or control of a packet of clearinghouse slips under his sock and inside his trousers. Obviously, the officer could neither see, hear nor smell the packet which was unlawfully possessed. In my opinion this misdemeanor was not committed in the presence of the police officer, or, in the terms of the statute, the defendant was not "*found* violating a law of this state" by the officer, thereby justifying the arrest without a warrant.

To avoid any misunderstanding, I do not assert that the act of possessing contraband materials never can be committed in the presence of an officer. Obviously, if the officer were to see the clearinghouse slips in the hand of the suspect or enough of the slip protruding above a pocket of the suspect to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence.

The problem here is to strike a balance between the public interest in the prevention of crime and the speedy apprehension of criminals and the interest of the individual in freedom from interference at the hands of the law. Nothing I have said should be taken as condoning the activities of this defendant. But, regardless of the conduct of this defendant, I am firmly convinced that the due-process requirements of the common law and constitutional provisions are not to be overlooked. The court must protect the fundamental rights of its citizens even

though in doing so the guilty may at times escape punishment. This is the price which a free society must pay to protect its freedom. We can not ignore the rights of some of the people without doing violence to the rights of all.

There is no place today for a procedure by which a police officer can justify an arrest by the results of his unlawful search and seizure. In other words, an unlawful arrest may not be made legal by the contraband seized. The end can not justify the means.

Particularly important in the instant case are the facts that the courthouse was open and that the arresting officer, knowing that he was "looking for him [defendant] in the area of East 115th Street and Beulah," had ample time in which to secure a warrant. There is no indication that the arrest was made without a warrant in order to prevent a threatened escape.

Under all the circumstances of this case, I believe that the arrest was unlawful. Hence the search and seizure was unreasonable and in contravention of the Fourth Amendment of the Constitution of the United States and Section 14, Article I of the Ohio Constitution. Accordingly, the ruling of *Mapp v. Ohio* (1961), 367 U. S., 643, requires that the judgment of the Court of Appeals in this case should be reversed and the cause remanded for further proceedings without the use of evidence obtained by the unlawful search and seizure.

TAFT, C.J., concurs in the foregoing dissenting opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 18

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF AMICUS CURIAE, OHIO CIVIL LIBERTIES UNION, In Support of Petition for Writ of Certiorari to the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF AMICUS CURIAE, OHIO CIVIL LIBERTIES UNION, In Support of Petition for Writ of Certiorari to the Supreme Court of Ohio.

INTEREST OF AMICUS.

The Ohio Civil Liberties Union is an organization dedicated to the preservation and extension of civil liberties, and particularly the freedoms protected by the United States Constitution.

This brief of *amicus curiae* is filed because it appears to us that the warrantless arrest and search which led to the conviction of the accused in this case—a conviction which flowed directly from the denial of a timely motion to suppress the evidence so obtained—collides violently with the federal constitutional standards to which state criminal procedure is obliged to conform. *Ker v. California,* 374 U. S. 23 (1963); *Mapp v. Ohio,* 367 U. S. 643 (1961).

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of the law of search and seizure with

which all law enforcement officials, federal or state, high or petty, must unswervingly comply, and in the hope that in some measure it may be of assistance to the Court in performing its delicate task of weighing "the social need that crime shall be repressed"[1] against "the social need that the law will not be flouted by the insolence of office",[2] this brief is filed.

Because we consider it to be highly important to the advancement of these objectives that this Court consider this case on its merits, *amicus* has elected to participate at this preliminary stage of these proceedings by filing this brief *amicus* in support of the petition for certiorari.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

STATEMENT OF THE CASE.

Petitioner, William Beck, was charged in the Cleveland Municipal Court with possession of clearing house slips under Ohio Revised Code Section 2915.111. Prior to the trial, petitioner filed a motion to suppress as evidence the clearing house slips which were taken from his person during a police search.

At the hearing on the motion to suppress, the only witness was the police officer who arrested the petitioner. He testified that, armed with a police photograph of the petitioner, knowledge of three previous arrests for clearing house operations and a tip from an informer whose identity he refused to reveal, he left the police station during daylight hours with the express purpose of arresting petitioner and "had in mind looking for [petitioner]

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[1] Mr. Justice Cardozo, in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[2] *Ibid.*

in the area of 115th Street and Beulah." Shortly before 1:00 p.m. he saw petitioner driving an automobile on East 115th Street. The officer admitted that petitioner was driving lawfully.

The arresting officer and other policemen identified themselves and asked petitioner to pull over to the curb. When petitioner stopped, the officers searched the car. During the search of the automobile, petitioner was placed under arrest "for a clearing house operation, scheme of chance" and, when the search disclosed nothing, petitioner was taken to the police station. His person was searched and the clearing house slips were found "beneath the sock of [sic] his leg."

Attempts by defense counsel to compel the disclosure of the identity of the informer whose tip was instrumental in the arrest were frustrated by the trial court. No testimony was offered as to the credibility of the informer, the previous reliability of his information, or other corroborating facts.

The motion to suppress was overruled, petitioner was tried, the clearing house slips were introduced in evidence at the trial, and he was found guilty as charged. The Court of Appeals of Cuyahoga County and the Ohio Supreme Court affirmed the conviction. It is these adverse decisions from which relief is sought here.

QUESTIONS PRESENTED.

I.

Did the arresting officer, whose only basis for a warrantless arrest and search was a police photograph of the accused, a record of three previous arrests for the same offense, and a tip from an unidentified informer, have probable cause sufficient to obviate the necessity of

procuring a search warrant within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

II.

Is a warrantless arrest under a state statute which provides that a police officer may arrest without a warrant a person "found violating" state or municipal law invalid where the contraband, possession of which is the gravamen of the offense charged, was completely concealed from the view of the arresting officer and was discovered only after a complete search of the clothing of the accused?

III.

Where the sole issue at a hearing on a motion to suppress evidence is whether the arresting officer had probable cause to arrest and search the accused, do the Fourth, Fifth and Fourteenth Amendments to the United States Constitution require that the arresting officer be compelled to disclose the identity of the informant whose tip resulted in such arrest and search, where the only other evidence showing probable cause in the arresting officer prior to the arrest and search were a police photograph and knowledge of three previous arrests of the accused?

IV.

In the absence of an emergency, and where the police had ample opportunity to procure a search warrant but failed to do so, is a warrantless search of the person of the accused *per se* unreasonable within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

REASONS FOR GRANTING THE WRIT.

The conviction of the accused on the basis of evidence obtained from a warrantless search of his person following a warrantless arrest raises grave constitutional problems involving the substantive law of arrest and search and seizure which require disposition by this Court.

Amicus contends

(I and II) that the arrest without a warrant was invalid, both

(A) because there was no showing of probable cause sufficient to satisfy the requirements of the Fourth and Fourteenth Amendments to arrest the accused, and

(B) because the state statute employed to validate the arrest, as interpreted by the state court of last resort, does not meet the minimum federal constitutional requirements embodied in the Fourth, and Fourteenth Amendments to the United States Constitution;

(III) that whether or not the warrantless arrest was invalid, the refusal of the trial court at the hearing on the motion to suppress to permit defense counsel to probe the identity and reliability of the informer whose tip was responsible for the arrest, was itself in violation of the Fourth, Fifth and Fourteenth Amendments because

(A) it prevented exploration of the probable cause requirement embodied in the Fourth Amendment as applied to the states through the Fourteenth Amendment;

(B) it shifted the burden of establishing the validity of the arrest and search from the prosecution where it rightfully belongs; and

(C) it violated the concept of fundamental fairness protected by the due process clause of the Fourteenth Amendment;

(IV) that whether or not the warrantless arrest was invalid, the failure of the arresting officer to procure either an arrest or search warrant when there was ample opportunity to have sought one from a magistrate invalidates the search of the person which yielded the evidence upon which the accused was convicted.

I and II.

While there was some question as to which of two Ohio statutes[3] were used to justify the arrest of the accused without a warrant in this case, the circumstances of the arrest here did not comply with the minimum federal standards of arrest contained in the Fourth Amendment to the United States Constitution.[4]

In view of the historical context in which the Fourth Amendment language was forged and its express language which delineates protections against unreasonable "sei-

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[3] The majority of the Ohio Supreme Court found that the accused was arrested for a *felony*, which under Ohio Rev. Code, Section 2935.04 requires a showing of "reasonable ground to believe that a felony has been committed" and "reasonable cause to believe" the accused "is guilty of the offense" in order to justify a warrantless arrest; the minority felt that he was arrested for a *misdemeanor*, which, in order to validate an arrest without a warrant, requires that the accused be "found violating a law. * * *" Ohio Rev. Code, Section 2935.03. See majority opinion, *State v. Beck*, 175 Ohio St. 74, 75 (1963) and dissenting opinion, 175 Ohio St. at 81.

[4] "The right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable *searches* and *seizures*, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be *seized*. U. S. Const. Amend. IV. (Emphasis supplied.)

zures" of "persons" as well as "searches" of "houses, papers and effects," it seems clear that the constitutional requirement of a warrant based upon probable cause is as applicable to arrests of the person as to searches of premises. "The [Fourth] Amendment protects the people against the seizure of their persons as well as against the search of their houses." *Wrightson v. United States*, 222 F. 2d 556, 559 (D. C. Cir. 1955). This Court has so held. *Henry v. United States*, 361 U. S. 98, 100 (1959); *McGrain v. Daugherty*, 273 U. S. 135, 156 (1927); *Albrecht v. United States*, 273 U. S. 1, 5 (1927); and see *Cochran v. United States*, 291 F. 2d 633, 634 (8th Cir. 1961). It follows ineluctably that the extension of the commands of the Fourth Amendment to the states by *Mapp v. Ohio*, 367 U. S. 643 (1961) as to searches applies equally to the law of arrest, although it is clear that a state may fashion statutory requirements for a warrantless arrest which exceed the minimum federal constitutional standard if it should desire to do so, and the constitutional validity of an incidental search will then be determined by the higher state standard. *United States v. Di Re*, 332 U. S. 581 (1948).

If the warrantless arrest was made pursuant to Section 2935.04 Ohio Revised Code,[5] the express language of the statute, as well as the command of the federal constitution, requires a showing of probable cause prior to the warrantless arrest. If the arrest was made on the basis of Section 2935.03 Ohio Revised Code,[6] the statute, to be

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[5] "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another *whom he has reasonable cause to believe is guilty of the offense.* * * *" (Emphasis supplied.)

[6] "A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal corporation.* * * *" (Emphasis supplied.)

applied to the instant facts, must be interpreted to permit a warrantless arrest in the absence of probable cause, merely upon a showing that the accused had upon his person, concealed from the arresting officer's view, contraband, possession of which was an offense under Ohio law.[7] And such an interpretation by the state court of last resort[8] would invalidate the statute and the arrest as repugnant to federal constitutional standards.

In either event, unless it can be shown that the arresting officer, prior to the arrest of the petitioner, had probable cause to believe that the accused was guilty of an offense, the arrest is invalid, and the fruits of the search of his person made incidental thereto must be suppressed.[9]

While evidence necessary to establish guilt is not required to demonstrate probable cause,[10] the mere good faith of the arresting officers is insufficient.[11] "Probable

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[7] Such an interpretation, while necessary to uphold the validity of the arrest here, has neither factual basis nor logic to commend it. See dissenting opinion of Gibson, *J.*, below, 175 Ohio St. at 81-82:

> "* * * for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be *revealed* in the presence of the officer and the officer must *perceive* that the offense is being committed * * *.
>
> "* * * The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody * * * of a packet of clearinghouse slips under his sock and inside his trousers. * * * In my opinion, * * * the defendant was not '*found* violating a law of this state' by the officer * * *."

[8] The construction of a statute by the highest court of a state fixes its meaning for the purpose of considering its constitutional validity. *Winters v. New York*, 333 U. S. 507, 514 (1948).

[9] *Henry v. United States*, 361 U. S. 98, 102 (1959); *Johnson v. United States*, 333 U. S. 10, 15 (1947).

[10] *Brinegar v. United States*, 338 U. S. 160 (1949).

[11] *Henry v. United States*, 361 U. S. 98, 102 (1959).

cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." [12]

Prior to the detention of the accused,[13] the arresting officer knew, as a matter of personal knowledge, only of petitioner's three prior arrests for clearinghouse operations. Whatever information he had about the *current* criminal activity of the accused came exclusively from a tip from an unidentified informer, whose credibility and previous record for giving reliable information were neither established nor disclosed by the prosecution.

Informer testimony alone can never be sufficient to constitute probable cause. *Cochran v. United States*, 291 F. 2d 633 (8th Cir. 1961). "An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest." *Contee v. United States*, 215 F. 2d 324, 327 (D. C. Cir. 1954). Unless the record demonstrates additional corroborative evidence within the personal knowledge of the arresting officers—knowledge either of the facts concerning guilt or of the reliability of the informer's information—the information can convey to the arresting officer no more than "mere suspicion" and an essential ingredient of probable cause is lacking. *Jones v. United States*, 362 U. S. 257 (1960); *Draper v. United States*,

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[12] Ibid.

[13] When the liberty of movement of the accused was first restricted by his being hailed to the curb by police, he was under arrest for purposes of determining the existence of probable cause, regardless of when the police say he was arrested. *Henry v. United States*, 361 U. S. 98, 103 (1959). But placing the arrest *after* the fruitless search of the car provides scant comfort to the arresting officer in his attempt to justify the arrest; it merely adds an additional piece of knowledge to the arresting officer's barren arsenal of information: awareness of the *lack of incriminating evidence* in the vehicle the accused was driving.

358 U. S. 307 (1959). "In testing the sufficiency of probable cause for an officer's [arrest] without a warrant [this Court] has held that he may rely upon information received through an informant rather than upon his direct observations, *so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.*" *Jones v. United States, supra,* at 269. This Court's insistence upon "facts within the knowledge of the [arresting officer]" as a necessary element of probable cause is a thread that runs consistently through the fabric of the decided cases. *Director General v. Kastenbaum,* 263 U. S. 25, 28 (1923); *Stacey v. Emery,* 97 U. S. 642, 645 (1878). It will not do to find, as the court below did,[14] that such direct knowledge of facts corroborating the informer's tip flows from the mere fact that the accused was actually found in the general locality where the informer said he would be, *so long as the behavior of the accused when apprehended was innocuous.* Acts which are "outwardly innocent" cannot constitute that factual knowledge which is essential to probable cause. *Henry v. United States,* 361 U. S. 98, 103 (1959). Nor is the fact that the arresting officer knew of previous arrests of the accused for similar offenses an independent piece of information bearing on the question of whether he was guilty of an offense *at the time of the arrest,* despite the reliance placed upon this item of policeman's knowledge

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[14] "* * * Information was given to the police by an informer that defendant would be in a certain locality at a certain time *pursuing his unlawful activities.* He was found in that locality, as predicted, *driving an automobile.* * * * [O]fficers sometimes base a part of their activities on information supplied them by informers, and *the only way to verify the reliability of such information is to make use thereof.*" (Emphasis supplied.) *State v. Beck,* 175 Ohio St. 73, 74, 76 (1963).

by the court below.[15] Else an accused with a prior criminal record could never be the subject of an illegal arrest.

Apart from these, the record in this case is barren of any other fact, substantial or insignificant, upon which may be predicated probable cause to arrest the accused without a warrant while he was driving an automobile lawfully, in daylight hours, on a public street where he had a perfect right to be. But for the contraband yielded by the search of the person of the accused which formed the basis of his conviction, the guilt of the accused is fashioned from spider webs. Although "whenever a culprit is caught red-handed * * * it is difficult to adopt and enforce a rule that would turn him loose,"[16] it is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States*, 333 U. S. 10, 15 (1947). This Court "has had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948).

III.

Quite apart from the validity of the warrantless arrest and search in the instant case, the refusal of the trial court at the hearing on the motion to suppress evidence to permit defense counsel to probe the identity and reliability of

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[15] "The Cleveland police had *good reason* to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. *There was testimony that he had previously been convicted on that score.*" (Emphasis supplied.) *State v. Beck*, 175 Ohio St. 73, 74 (1963).

[16] Douglas, J., dissenting in *Draper v. United States*, 358 U. S. 307, 314 (1959).

the informer upon whose tip the arrest was made, raises serious and important constitutional questions.

The extent to which an accused must sacrifice important Fourth Amendment rights to protect the policeman's sources of information and the safety of his informer is a delicate and complex matter. The court below resolved the question by not considering it.[17]

On the one hand, it is admitted that in some cases, the security of the informer and his effectiveness as a police instrumentality depends upon his anonymity. But where the legality of an arrest and search has been placed in issue, both minimum standards of fairness and the imperatives of the Fourth Amendment require that the accused be permitted on cross-examination to probe beneath the arresting policeman's bare assertion that he had probable cause (based upon the tip of an informer whose identity and reliability he will not disclose) to make the arrest. If permitted to cross-examine, defense counsel may find that there are no facts within the knowledge of the arresting officer which corroborate the informant's information,[18] that the arresting officer had no prior or subsequent information as to the reliability of the informer's tip,[19] or that the informant was himself instrumental in the

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[17] "The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And *a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration* in the circumstances narrated." *State v. Beck*, 175 Ohio St. 73, 77 (1963).

[18] Fatal to a finding of probable cause to justify an arrest or search. *Husty v. United States*, 282 U. S. 694, 701 (1931).

[19] Equally disastrous to the claim of validity of the arrest and search. *Draper v. United States*, 358 U. S. 307 (1959); *Jones v. United States*, 357 U. S. 493 (1957).

crime with which the accused was charged.[20] "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U. S. 53, 62 (1957).

If probable cause is an essential constitutional element to validate an arrest and search, as this Court's prior decisions in this area insist, the surest way to emasculate the requirement in practice is to deny defense counsel extensive cross-examination of the prosecution's witnesses as to the factual basis of the knowledge urged by them to justify the arrest and search. For it is not unknown for law enforcement officers to create a fictitious informer to supply the basis for an arrest and attempt to enshroud their fraud in secrecy by refusing to divulge the faceless informer's identity. E.g., *King v. United States*, 282 F. 2d 392 (4th Cir. 1960). "* * * [T]here comes a point where this Court should not be ignorant as judges of what [they] know as men." *Watts v. Indiana*, 338 U. S. 43, 52 (1949).

Moreover, apart from the necessity of disclosure of pertinent details of an informer's identity and information as a means of assuring the continued function of Fourth Amendment protections, "a further limitation on the applicability of the privilege [against disclosing the identity of informers] arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure

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[20] Facts which would eliminate the requirement of secrecy as to the informer's identity. *Roviaro v. United States*, 353 U. S. 53 (1957); *Portomene v. United States*, 221 F. 2d 582 (5th Cir. 1955); *United States v. Conforti*, 200 F. 2d 365 (7th Cir. 1952); *Sorrentino v. United States*, 163 F. 2d 627 (9th Cir. 1947).

and, if the Government withholds the information, dismiss the action." *Roviaro v. United States*, 353 U. S. 53, 60 (1957).[21]

Furthermore, it must be noted that, although petitioner in the instant case attacked the legality of his arrest and search at his earliest opportunity, the prosecution never produced testimony in chief showing corroboration of the facts of the informer's tip nor prior or subsequent reason to rely on such information. Since the burden of showing probable cause is upon the prosecution,[22] "courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority. Certainly the police have been warned enough in these respects * * *." *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

Absent evidence to sustain its burden of proof as to probable cause without the informer's information and upon its failure or refusal to lay an appropriate factual foundation for invoking the privilege against revealing the identity of its informer, the prosecution's witness should have been compelled to answer questions concerning the alleged informer and his information. Failure of the trial court to compel disclosure or, in the alternative, dismiss the charge, is violative of the Fourth Amendment and due process of law. *Roviaro v. United States*, 353 U. S. 53 (1957).

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[21] Lest it be urged that such disclosure may be compelled only at the actual trial of the accused and not by preliminary motions, the *Roviaro* court was dealing with a pre-trial motion for a bill of particulars. See also *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

[22] *Cervantes v. United States*, 263 F. 2d 800 (9th Cir. 1959).

IV.

The ingenious use by the Cleveland Police of a warrantless arrest to justify a warrantless search, with further justification of both by the contraband yield of the search so made, is alarming, the more so because all of the courts in the State of Ohio that have reviewed this police action have given it judicial sanction.

The principle that law enforcement officials are required by the Fourth Amendment to seek a warrant for an arrest and search except upon a showing of *urgent necessity*[23] has been too frequently ignored by the police, unfortunately, in many instances, with judicial acquiescence.

The rule requiring a warrant has been, in large measure, eaten away by the corrosive exceptions which have been engrafted upon it. This circumvention of the requirements of the Fourth Amendment stems in large

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[23] See *McDonald v. United States*, 335 U. S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The Fourth Amendment] guarantee of protection against unreasonable searches and seizures * * *, *with few exceptions*, stays the hand of the police *unless they have a search warrant* issued by a magistrate on probable cause supported by oath or affirmation. * * * We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency*, the Fourth Amendment has interposed a magistrate between the citizen and the police. * * * It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. * * * We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis added.)

measure from the unfortunate[24] decision of this Court in *United States v. Rabinowitz*, 339 U. S. 56 (1950), which substituted the test of "reasonableness" of a search for the requirement of a warrant. But even in *Rabinowitz*, a magistrate had an opportunity to examine the facts alleged to demonstrate probable cause before the arrest because there the search was an incident of an arrest based upon a *valid warrant*. In the present case a judicial officer never had an opportunity to judge the question of probable cause because the police justified their warrantless search of the person of the accused by an arrest which was also without a warrant. And their cynical disregard for the constitutional command to procure a warrant is best demonstrated by the facts in the instant case: the arresting officer left the police station during business hours of the court. Magistrates were available nearby to hear his application for a warrant of arrest or search had he elected to seek one. There was no particular urgency about arriving at the place of arrest, nor could he have known that the accused would be found in an automobile. Instead, at 1:00 p. m., he stopped the accused while driving lawfully on a public street on the basis of no more information than he could have presented to a magistrate before he left the police station.

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[24] See Frankfurter, J., dissenting in *Rabinowitz*, 339 U. S. at 83-84:

> "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant. * * * It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable. * * * [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment."

So long as policemen are permitted the alternative of making arrests and searches without a warrant, it is apparent that they will not voluntarily seek them. Why should they apply for a warrant in which they must describe the place to be searched and the articles to be seized with particularity when they can arrest the suspect, conduct a general and roving search which a magistrate would never permit them by warrant and perhaps turn up some incriminating evidence which would justify the arrest *ab initio*? But such an approach, while efficient from the law officer's viewpoint, cannot be constitutionally justified on such grounds.[25]

Both before and since the holding in *Rabinowitz*, this Court has on a number of occasions pointed out that policemen are *not* permitted to make their own choice as to whether or not they will procure a warrant before making an arrest and search—that where urgent necessity to arrest and search are not present and it is practicable to procure a warrant, an arrest or search without one will be constitutionally defective, even where the officers had the requisite factual knowledge to constitute probable cause. *Chapman v. United States*, 365 U. S. 610, 613 (1961); *McDonald v. United States*, 335 U. S. 451 (1948); *Johnson v. United States*, 333 U. S. 10 (1947); *Taylor v. United States*, 286 U. S. 1 (1932); *Agnello v. United States*, 269 U. S. 20, 33 (1925); *Weeks v. United States*, 232 U. S. 383 (1914). And see *Trupiano v. United States*, 334 U. S. 699

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[25] See *McDonald v. United States*, 335 U. S. 451, 454-455 (1948), in which Justice Douglas speaking for the court, said: "[T]here must be compelling reasons to justify the absence of a search warrant. * * * No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement. * * *"

(1948), overruled on this point two years later in *Rabinowitz*.[26] It is true that the search of stationary premises was primarily in issue in these cases, while in the instant case the person of the accused was searched after being apprehended in an automobile; but the imperatives of the Fourth Amendment apply to searches and seizures of persons as well as the search of their houses, *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955), and their mere presence in an automobile does not deprive them of the immunity from search of the person to which they would otherwise be entitled, *United States v. Di Re*, 332 U. S. 581, 587 (1948).

The instant case provides a clear illustration of a situation where a law enforcement officer had ample opportunity and time to procure a warrant in advance of an arrest and search, but failed or refused to do so. It should stimulate this Court to re-examine the broad exceptions which have emasculated the general rule that a warrant is an imperative of the Fourth Amendment, to limit these exceptions to the most stark police necessity, and to reaffirm the principle that, whether or not a search is incident to a valid arrest, "law enforcement agents must secure and use search warrants wherever reasonably practicable." *Trupiano v. United States, supra*. And such a rule is particularly compelling where, as here, the arrest was made without a warrant for a crime not committed in the presence of the arresting officer.

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[26] See the dry observations of Mr. Justice Black in *Rabinowitz*: "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule * * * at least long enough to see how it works." 339 U. S. at 67 (dissenting opinion).

CONCLUSION.

Amicus has urged the invalidity of the warrantless arrest and resulting search, the impropriety of the trial court's refusal to permit defense counsel to probe the identity and reliability of the informer whose information was the basis of the arrest, and the unconstitutionality of the warrantless arrest and search when there was ample time and opportunity to procure a warrant. For these reasons, *amicus* urges this Court to grant the writ of certiorari sought by petitioner so that his conviction may be reviewed and, ultimately, reversed.

In seeking review of this petitioner's conviction for a "numbers" offense, *amicus* shares the view of Mr. Justice Jackson:[27]

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

Respectfully submitted,

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[27] *McDonald v. United States*, 335 U. S. 451, 459 (1948) (concurring opinion).

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The Ohio Court of Appeals affirmed the judgment of the trial court without rendering a formal opinion. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

The formal opinion announced by the Supreme Court, with two judges dissenting, was officially published in 175 Ohio State 73 (1963). Said opinion is incorporated in brief of petitioner, Appendix IV.

JURISDICTION.

Petitioner is invoking the jurisdiction of the Supreme Court of the United States under title 28 U.S.C.A., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1.

Were the clearinghouse slips obtained by illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2.

Did the trial court err in refusing to order the police to disclose the identity of the informer?

STATEMENT OF THE CASE.

The police officers involved in the instant arrest had received confidential information that the Petitioner, William Beck was carrying on a clearinghouse operation, scheme of chance. They also knew that the same William Beck had a record of three previous arrests and convictions which were indicative of the fact that he was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. They also had a photograph of the accused.

The officers were members of the Bureau of Special Investigation Unit of the Cleveland Police Department. They knew where to look for the petitioner. They went to that locality at a time of day when "pickup men" are most active picking up slips. They knew, from their own personal knowledge of the past history of Beck together with the information they had received, that if they did find Beck operating a motor vehicle in such neighborhoods they would have reasonable ground to arrest him.

It was about one o'clock in the afternoon of November 10, 1961 when the Defendant was first seen operating a motor vehicle on Beulah Avenue north of East 115th Street. The Defendant was ordered to stop, the police

officers identified themselves, then searched the automobile but found nothing. The Defendant nevertheless was placed under arrest as being connected with the carrying on of a scheme of chance, conveyed to the 5th District where he was searched. An envelope with sheets of clearing house slips was found on his person. The Defendant subsequently was tried and found guilty as charged.

The Defendant was charged with violating Section 2915.111 of the Revised Code of Ohio. Before proceeding to hear the trial on the merits, the Court entertained a motion to suppress the evidence. The Defendant offered testimony to show that in his opinion the motion to suppress should be granted. The Court, however, overruled the motion, contending the arrest was lawful and the search was incidental to the arrest; that the arrest was made upon reasonable grounds that a felony had been committed.

In due course application for new trial was made and overruled. The case was reviewed by the Court of Appeals of Cuyahoga County which affirmed the judgment of the trial court. The following statement appeared in the Legal News of this city.

> "25890. M.C.—State of Ohio vs. Beck. Judgment affirmed. The record discloses bona fide arrest of deft. during commission of felony (Section 2915.-111, R. C.) reported to police officer by informant, Knowledge of police officer of previous convictions of deft. for like offense and locale and method of committing said crime and we conclude and hold therefrom that there was probable cause for the arrest, that search of person was reasonable and, therefore, lawful, and that the disclosure of the name of the informant to be neither relevant nor material in the cause, Ballard vs. State, 43 Ohio St. 340; In re

Quaries and Butler, in re McEntire and Goble, 158 U. S. 532, 535; State vs. Viola, 51 Abs. 577; Wigmore on Evidence, Vol. 8; para. 2374, page 751, 752, 756. Exceptions. O.S.J."

Thereupon the petitioner filed in the Supreme Court a motion to certify the record and appeal as of right. The motion was granted and the court heard the case on the merits. Judgment of the Court of Appeals was affirmed, *State vs. Beck*, 175 O. S., p. 73.

14 *O. Jur.* 2d 683. Courts.

Section 248 * * * Syllabus as confined to the facts; application to other cases.

"The syllabus states the law with reference to the facts upon which it is predicated, and will not be regarded as controlling in another case in which the controlling facts are totally different, even though the legal questions involved are identical. It has been held that the Supreme Court's syllabi do not bind the Supreme Court or other courts in another case not on 'all fours.'"

The syllabus of *State v. Beck*, 175 O. S. 73 is as follows:

"1. All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.

2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial

to the accused in making a defense to a criminal charge lodged against him."

The law of the State where an arrest without a warrant take place determines its validity. *U. S. v. Di Re*, 332 U. S. 589.

LAW AND ARGUMENT.

Under the state of the record the court's refusal to sustain the motion to suppress was not error.

On the motion to suppress the evidence the trial court had before it a question of law which had to be determined upon the facts and circumstances of *this particular case*. The rule is well settled that in the first instance the reasonableness of search and seizure is to be determined by the trial judge from the facts and circumstances of the case and in the light of fundamental "criteria" laid down by the 4th Amendment and the decisions of the United States Supreme Court, *Ker vs. California*, 374 O. S. 23; *United States vs. Robenowitz*, 339 U. S. 56.

To support what is alleged in the motion, the petitioner called one and only one witness. He chose to rely solely on the facts developed by this witness to prove that the arrest was without probable cause.

None of the evidence offered by the petitioner was controverted by the State. Everything that the witness did testify to was indicative of the fact that there was probable cause for the arrest.

It is up to the trial judge to scrutinize and weigh in the light of the common experiences of man, evidence which tends to prove or disprove that the search and seizure was unreasonable.

"Determination of 'probable cause' for search without a warrant requires a dealing with probabilities, which are not technical, but are factual and practical con-

sideration of everyday life on which reasonable and prudent men, not legal technicians, act, and the standard of proof is accordingly correlative to what must be proved."

Brinegar v. U. S., 338 U. S. 160.

"There is no formula for determination of reasonableness. Each case is to be decided on its own facts and circumstances."

Go-Bort Co. v. United States, 283 U. S. 344-377.

The simple question that confronted the court was whether or not the facts and circumstances, which existed at the moment of arrest were evidence sufficient to constitute probable cause to arrest.

A very much respected opinion which deals with probable cause is found in *United States v. Rembert*, 284 Fed. 996. An excerpt from the opinion is as follows:

" 'The provision against unreasonable searches and seizures, being directed to prevent general exploratory writs and investigations of the homes of persons and the property of the citizen, has no application to and does not prevent the arrest in accordance with the course of common law, and of the statutes directing the same without a warrant, and wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief, an arrest may be made without a warrant, and the instruments and evidence of crime seized.' "

The perpetrators of crimes against the state try to find refuge in the language contained in Section 2935.03 Revised Code, in that they attribute to the legislature an in-

tention to give to the word "found" a hostile meaning against law and order, in that the officer is restricted to his sense of sight alone. Too many cases have been decided otherwise. See *Houck v. State,* 106 O. S. 195; *Ballard v. State,* 43 O. S. 340.

If a court does decide from the facts and circumstances of a particular case that probable cause does not exist, the proof of that fact should be so obvious that the decision leaves no room for speculation. The chasm that exists between what is reasonable and what is unreasonable should be so wide that a court which would rule one way when it should have ruled the other would be guilty of a gross abuse of discretion.

On the other hand if the evidence relied upon to decide if probable cause existed is of such weight that the scales may tip either way, then in that case whatever the decision the trial court may make it should be decisive. Under such circumstances an appellate court should not be prone to substitute its judgment for the trial court.

In the case of *Husty vs. United States,* Vol. 282 U. S. page 694, on page 700 the court said in its opinion:

> "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonable, discreet and prudent man to believe that liquor is iliegally possessed in the automobile to be searched."

Reasonableness of search and seizure is the ultimate constitutional test of the lawfulness of a search and seizure. It is the prerogative of the trial court to determine from the facts, circumstances and reasonable inferences that can be drawn therefrom whether or not a search is reasonable.

In this case the court could infer from the facts and circumstances that the police, being members of the Bureau of Special Investigation were specialists in the arrest and investigation of crimes having to do with the clearinghouse racket. The court could infer also that at the time the information was received, they understood that the petitioner was presently active in a particular neighborhood carrying on his assigned part in furthering the carrying on of a scheme of chance. The court could infer that the police knew the party who apprised them of this fact. The court could infer that this information together with what they already knew about the petitioner and observing him at a time of day in a particular neighborhood where they had no reasonable grounds to believe that he had any business there other than what they believe him to be doing, that is: carrying on a scheme of chance.

The court knew that at that moment the police could go no further—they had a choice, either arrest the petitioner or abandon the idea of apprehending a man that they had a bona fide belief was committing a felony in their presence. It was not a coincidence that the petitioner at the moment of arrest was carrying on a scheme of chance.

Columbus v. Riggle, 36 Ohio Law Abstract, 190 (decided September 9, 1941), headnote 1, Arrest (Abs. & O Jur.):

> "1. A person arrested while driving his car upon the city streets in the course of collecting slips containing records of wagers of those engaged in the 'numbers game' was engaged in the commission of an offense in the presence of an arresting officer so that no warrant was required, it being clearly established that the numbers game is a game of chance prohibited by ordinance."

In *Houck v. State*, 106 O. S., 195, the facts in this case were that an officer had information regarding a particular individual transporting liquor in his automobile. The officer came upon the automobile while it was parked, searched the vehicle and found the incriminating evidence —held to be a reasonable search. Syllabus 2 of this case is as follows:

> "A search of an automobile by an officer and a seizure by him of intoxicating liquors then being possessed and transported in violation of law, without a search warrant, is authorized though the officer has no previous knowledge of such violation, provided he acts in good faith and upon such information as induces the honest belief that the person in charge of the automobile is in the act of violating the law."

In the case of *U. S. v. Harris*, Vol. 331 U. S. page 145, the government officers had an arrest warrant for Harris. They questioned him in his apartment and incidental to the arrest searched the apartment. The officers found draft cards which were not related to the crime for which he was questioned. He nevertheless was charged with illegal possession of Government property and these draft cards were used as evidence against him. The court said on page 154 of its opinion as follows:

> "There during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property of which the Government was entitled to possession. In keeping the draft cards in his custody petitioner was guilty of a *serious and continuing* offense against the laws of the United States. A crime was being committed in the very *presence* of the agents conducting the search. Nothing in the decisions of this Court gives support to the question that under such circumstances the law-enforcing officers must impotently stand aside and

refrain from seizing such contraband material." (Emphasis ours.)

A very pertinent statement applicable to the above subject is stated in the opinion of *State of Ohio v. Emerson Young*, No. 25915 in the Court of Appeals, Eighth Judicial District. We find on page 4 of the opinion the following:

> "Numbers tickets are easily secreted on or about the person, just as stolen jewels, narcotics or money can easily be placed on the person. If one may stand in the presence of an officer who is making a lawful search of premises, bearing on his person contraband articles such as those above named, and be secured from arrest and subsequent seizure of those articles, then enforcement becomes next to impossible, police officers are impotent, and the law-abiding people will become ruled by the lawless."

The United States Supreme Court held in *Draper v. United States*, 358 U. S. 307 "That information from a reliable informer corroborated by the agents observations as to the accuracy of the informer's description of accused, and of his presence at a particular place, were sufficient to establish probable cause for arrest without a warrant."

Summary.

The petitioner's hearing on the motion to suppress the evidence was fair and impartial and the determination arrived at by the trial judge was in accordance with the laws of Ohio, the constitution of this state, and the constitution of the United States; and concurs with the pronouncements of the United States Supreme Court in *Ker v. California*, 374 U. S. 23.

The trial judge was unique, he had been a police officer, a member of the Ohio State Legislature, a lawyer and a judge. In the Appellate Court two of the three mem-

bers had occupied the office of Chief Police Prosecutor then Municipal Court judge, next a tenure on the Common Pleas bench, finally a number of terms on the Appellate bench; the third member had been a Common Pleas judge then an Appellate Court judge up until the time of his demise. Finally in the Supreme Court five members of the court had no difficulty in affirming the trial court's judgment, and the writer of the majority opinion had been a member of the highest court of his state for thirty years! Certainly a decision, the fruit of such respectability, should stand untrammeled by the pique attack of its dissenters.

We cannot presume to know whether this judgment will be disturbed or not, but in either event the law of the case cannot be changed without the basic standards and principles which the United States Supreme Court itself has adhered to, also be changed.

So far as the petitioner's interest is concerned he is simply grieved with the result and not the law. There was no invasion of petitioner's rights under Ohio law nor the 14th amendment. In the trial court there was only a question of law to be resolved. This was not another *Dollree Mapp* case. All of the members of the Ohio Supreme Court were agreed that "under well established law, the search of defendant and seizure of the packets of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest"; five of the seven members of the court agreed that it was a valid arrest.

The record shows that in this case the defense witness repeatedly stated that he arrested the petitioner for the commission of a felony. These statements were not controverted by any one. Yet in this Court and the Appellate Courts of Ohio the petitioner has asserted that the arrest was for a misdemeanor; though the highest court in this state has determined that the offense described under R. C. 2915.111 is a felony. *State vs. Beck*, 175 O. S. 73.

> "It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony." (Citing cases.)

In Ohio misdemeanors are defined by statute as minor offenses, O. R. Code 1.06. There is no provision in this state that provides that you may be sentenced to the penitentiary for the commission of a misdemeanor no matter how many times you commit the same offense. However, a person may be sentenced to the penitentiary for a subsequent violation of R. C. 2915.111. Therefore it is of small consequence what particular offense the petitioner was ultimately charged with so long as it related to the crime the police officers believed he was committing.

> "There is a difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest and search." *Brinegar v. United States*, 338 U. S. 160-172-173.

Although the petitioner directs the court's attention to numerous United States Supreme Court decisions, the controlling facts of those cases are totally different from the facts in this case. In the instant case the police had to find the petitioner at a time of day in a particular locality doing the very thing they expected to find him doing and when they did find him under such circumstances the only appropriate arrest that could be made, had to be made at the moment of discovery. There would be no time for obtaining warrants.

The officers knew that they had probable cause to arrest the accused and "Beck" knew tha. the officers had probable cause to arrest him. He knew at the time he was apprehended he was committing a continuing offense

in the presence of the officers. In fact it can be gathered from the petitioner's minute preparations that he anticipated the arrest and had prepared for such a contingency. What he did not reckon with however, is that the police would cart him off to a police station where an appropriate and complete search could be made for the clearinghouse slips which they knew had to be on his person.

The only hitch in the minority opinion is that it claimed it was not a valid arrest because in their opinion the arresting officers had to have something more than "probable cause." In their opinion a bona fide belief based upon probable cause was not enough. The officers had to actually see and identify the contraband while in possession of the accused before they could intercept him.

> "If the officers were to see the clearinghouse slips in the hand of the suspect or enough of the slips protruding above a pocket of the suspects to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence."

It is however, inconceivable that the accused would be so foolhardy as to flaunt the evidence in the face of the police. Consequently, if the minority opinion is a correct one, then the officers of the law shall be required to stand idly by while such operations are carried on before their very eyes—but can do nothing because the contraband which they know is there is concealed from view and the operator of the automobile will not stand long enough for the officer to obtain a warrant to search and seize such contraband. As of now such a theory is unsupported by authority. The only support is the statement contained in the minority opinion in which the writer of the opinion states "In my opinion this misdemeanor was not committed in the presence of the officers."

How insincere was the belief of "Beck" that he was illegally arrested can easily be gathered from the questions asked the officer on direct examination (Pet. Brief 5 and 6). They were intended only to present a factual picture of the action which took place at the scene of the arrest and the subsequent search. Petitioner actually avoided asking the witness what was the information that "sparked" the investigation.

Certainly, the law is entitled to at least an equal chance in enforcement, as the criminal exercise in violating the law.

When the officers know their man! When they know his record! When they have information that he is back in the racket! When he is found under the same circumstances, doing the same thing that he had been doing on other occasions when he was arrested, shouldn't the police act with the same dispatch and urgency that the offender does in trying to get away with breaking the law?

Does the government have the right to refuse to reveal the identity of an informer or source of information?

So far as the decisions of this State are concerned the courts have consistently held that the government does not have to reveal such information.

The most recent case which has dealt with this subject is, *State v. Viola*, 51 Ohio Abs., 577, decided June 6, 1947,—the headnote reads as follows:

> "In a criminal trial, a police officer should not be compelled to divulge the identity of his informant whose information led to the apprehension of the accused, since to compel him to do so would tend to cause persons possessing valuable information concerning crimes committed to conceal it from proper authorities for fear of unwanted publicity."

Other cases which have been decided in which the privilege has been discussed is *State, Ex Rel. Kehker v. Wolf*, 26 Ohio Nisi Prius (N. S.), 521, and *Parker v. Reddy*, 14 O. C. C. (N. S.) 288. Both of these cases held that communications made to police officers of the violation of the law are privileged communications.

It is usually the case, in each instance when this subject is discussed that reference is directed to the United States Supreme Court case, *In Re Quarles and Butler, Petitioners*, 158 U. S. Reports, page 532. On page 535 of the opinion in that case the court said:

> "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and duty to communicate to the executive officers any information he has of the commission of an offense against those laws; and such information given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government."

The above mentioned United States Report has neither been reversed nor criticized in any later opinion of that Court so that it can be reasonably stated that as a general rule the government does have the right to refuse to reveal the identity of an informer or the source of information.

In recent Federal Court cases—in those instances where search and seizure has been made *without* a search warrant, the Courts have held where disclosure of informer identity or contents of communication *is relevant*

on issue of probable cause, the court may require disclosure and if government withholds information dismiss the action.

These rulings, however, are only applicable when the court orders the witness to reveal such information and he refuses. These cases have no application in those instances where the court does not order the witness to reveal such information.

In the instant case it is well to note that the trial judge did not order the witness to relate the name of the informer, stating that such information was irrelevant.

There is nothing in the record of this case to show the Petitioner was deprived of "due process," nor that failure to reveal the name of the informer was prejudicial to the rights of the Petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, ~~1963~~ 1964

No. [redacted] 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF PETITIONER.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF PETITIONER.

STATEMENT OF CASE.

I.

William Beck, the Petitioner, was charged and convicted of a violation of Revised Code of Ohio, § 2915.111, wherein it was charged that on the 10th day of November, 1961, he had in his possession or under his control, certain illegal gambling slips. Prior to trial the Petitioner moved to suppress certain evidence, which evidence, it was alleged, had been seized in violation of the constitutional prohibition against illegal searches and seizures. Also, it was contended that the use of such evidence seized in violation of the constitution "is by that same authority inadmissible in a state court." This Motion, following a hearing, was denied and on the merits the original judgment herein being challenged was rendered. Petitioner was then sentenced.

In due season, Petitioner appealed this cause: first, to the Ohio Court of Appeals, which routinely affirmed this judgment without any discussion. Next, upon its consideration on the merits, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals. The opinion of the Supreme Court of Ohio is reported, *State v. Beck*, 175 Ohio St. 73 (1963).

The transcript of Record, hereinafter referred to as (R.), shows as follows:

To support the allegations made in the written Motion to Suppress (R. 3), the defense gave evidence through Sergeant Carl Delau, one of the arresting officers. This officer testified that he was a member of the Cleveland Police Department and that at about 1:00 o'clock p. m., on the 10th day of November, 1961, while in the company of several other officers, they stopped Beck shortly after he had turned east from East 115th Street onto Beulah Avenue. The Sergeant further related that they (the officers) did not stop him for any traffic offense. As the Sergeant phrased it, "I identified myself and requested him to pull over to the curb" (R. 6). Further testimony was in response to these direct questions:

> "Q. Then you searched his automobile.
> A. Yes, I did.
> Q. Prior to that, did you indicate to him that he was under arrest?
> A. Not while searching the automobile" (R. 6).

The search conducted of Petitioner and his car at that time was not productive of any contraband or the fruits of illegality. However, despite this abortive exploratory search, William Beck was placed under arrest. In this regard the following excerpt of testimony is significant:

"Q. Why then did you place him under arrest?

A. I placed him under arrest for a clearinghouse operation, scheme of chance.

Q. At that time, you had discovered some evidence of a scheme of chance?

A. I did not.

Q. At the time you placed him under arrest, you did not have any evidence?

A. Other than information.

Q. In other words, you heard rumors?

A. I heard reports and found that he has a record in connection with clearinghouse and scheme of chance.

Q. Previous convictions?

A. Yes.

Q. On this information, you arrested him on the City streets?

A. On Beulah Avenue.

Q. And you searched the automobile?

A. Yes.

Q. Did you find anything as a result of that search?

A. No.

Q. Then what did you do?

A. I conveyed him to the Fifth District, where we searched him.

Q. In other words, you didn't find anything as a result of your search of the automobile?

A. That is correct.

Q. Then he was transported to the Fifth District Station, which is on Chester Avenue?

A. 107th and Chester.

Q. At 107th and Chester, you then searched Mr. Beck?

A. I did.

Q. Prior to your searching of Mr. Beck, he was under arrest?

A. Yes, he was" (R. 5-6).

II.

Suffice it to say, their search of William Beck at the District Station revealed, secreted in his clothes, the illegal clearinghouse number slips.

With regard to the officer's testimony that he had "information," he was specifically asked: "from whom did you get this information?" The response was "I couldn't divulge this information" (R. 10). Counsel for the Petitioner then made an appropriate argument for the disclosure of the sought for information.

The Court after first reserving its ruling on this request that the Court order the witness to answer the question, ruled: "I am not going to order the patrolman to testify as to the name of the informer on the grounds of irrelevancy" (R. 11).

Concerning this latter ruling by the Court, it followed this specific question by the Court:

> "The Court: I have a question, Officer. When you placed this man under arrest did you place him under arrest for a felony or a belief that a felony had been committed?
>
> The Witness: Under a belief that a felony had been committed, under State law, carrying on a scheme of chance is a felony, on that basis, I arrested him" (R. 11).

III.

In its opinion the Supreme Court of Ohio ruled, in effect, that in moving to suppress unconstitutionally seized evidence, an accused is not making a defense against the charge lodged against him. Thus that Court held:

> "It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such

> disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him." *State v. Beck*, 175 Ohio St. 73 (1963), (R. 15).

As regards the existence of probable cause for an arrest without a warrant (and presumably for the issuance of a warrant), according to the challenged authority of this opinion, the police in Ohio are to be delegated the power to justify, with impunity, their own illegal acts by resort even to a fictional or phantom informer as the supplier of requisite probable cause. This is so because, under the announced Ohio Rule, the mere statement by an officer that such informer exists or gave reliable information is not subject to dispute. Not only this, but such statement is entitled to be viewed, as was done by the Supreme Court of Ohio, as conclusive on the question of: the honesty of the belief of the arresting officer; the reliability of his "informer"; the reasonableness of his reliance on the information supposedly supplied; the existence of probable cause and their right to arrest without a warrant.

Consider in this latter regard, the following holding by the Supreme Court of Ohio in their disposition of this appeal:

> "All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles" (Id., 175 Ohio St., at 73), (R. 15).

The dissenting opinion took the position, consistent with numerous pronouncements from this Court that the validity of the search and seizure without a warrant after

an arrest is dependent upon the arrest being valid. (Id., 175 Ohio St., at 78), (R. 21). Also, it was cogently argued by the dissentors, that: the officer's "conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good faith on the part of the arresting officer is not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony." (Ibid.)

SUMMARY OF ARGUMENT.

With *Mapp v. Ohio*, 367 U. S. 643 (1961), constitutional efficacy and enforcement was given to the exclusionary rule. *Ker v. California*, 371 U. S. 33 (1963), resolved the issue as to the proper standards to be applied in gauging the recurring problems involved in the frequent challenges now, more than ever before in history, being made against the conduct of enforcement officers.

In all probability it was envisioned by this Court that there would be some resistance to the full impact of these cases. And it is probably true that in no other State has the resistance to these doctrines been more pronounced than it is in Ohio, where most of these cases are disposed of by resort to the fiction of "harmless error" facilitated by means of an omnium-gatherum entry to the effect that: "the Court finds no error prejudicial to the appellant." (See, R. 13.)

The effect of this type of judgment entry, dispositive of appeals raising numerous and complicated questions in the area of searches and seizures, is that on the local level there are in most areas precedent voids. In addition to this, in the very few cases where opinions are reported the cases have been wrongly decided (See, e. g. *State v. Young*, 185 N. E. 2d 33 [Ct. of App., 1962]), or so general as to be ab-

solutely worthless as a precedential authority. (See, *State v. Coleman*, 186 N. E. 2d 93 [Ct. of App., 1962].)

In this cause, it is our contention that:

1. Probable cause for an arrest without a warrant is not established, at hearing on a Motion to Suppress evidence, by a policeman's testimony that he received a tip from an unnamed and unidentified informer when the defense's motion for disclosure is denied.

2. A State cannot, consistent with the constitution, refuse to require the disclosure of an alleged informer where the existence of probable cause is predicated on information supposedly supplied by such informer.

3. In making the substantive determination of the reasonableness of a warrantless arrest or search, a state court cannot arbitrarily accept as conclusive the testimony and subjective judgment of police officers on the issue of the existence and reliability of an unnamed and unidentified informer.

4. Even where there has been a lawful arrest the incidental search of the person of the accused without a warrant is limited to safeguarding the arrest and the arresting officer.

5. A crime is not committed in the presence of an officer, so as to justify an arrest without a warrant, when the gravamen of such offense is the possession of contraband, knowledge of which was not available to the officer prior to the search.

6. Where there is time to procure an arrest or search warrant, any warrantless arrest and search is "unreasonable" so as to constitute a violation of the Fourth and the Fourteenth Amendments.

ARGUMENT.

The threshold question raised by Petitioner's Motion to Suppress was essentially this: was the arrest of the Petitioner and the search of his person legal? If in fact the evidence sought to be suppressed by the Motion was obtained as a product of an illegal search and seizure, it is not admissible over objections, by reason of the constitutional guarantees against illegal searches and seizures (invasion of privacy) and/or against self incrimination. *Mapp v. Ohio,* 367 U. S. 643 (1961).

In resolving the question of legality we start with the premise that: The Fourth Amendment to the United States Constitution does not permit the stopping of an individual operating a motor vehicle on a public street, detention of said individual, search of the vehicle, physical deprivation of liberty without probable cause. *Henry v. United States,* 361 U. S. 98 (1959). And facts developed after the arrest of an individual will not justify or give validity to the act of arresting, this is so even when the items discovered prove to be of a contraband nature. *United States v. Jeffers,* 342 U. S. 49 (1951). A search is reasonable as an incident to an arrest only if the arrest is lawful. *United States v. Di Re,* 332 U. S. 581 (1948).

On the other hand, an incidental search is, as the term implies, incident to the arrest. The primary purpose being the arrest with the search purely incidental. An exploratory search, such as was consummated here, is one in which the search is the primary object and the arrest is used as pretext to justify the search. *Worthington v. United States,* 166 F. 2d 557, 566 (6th Cir. 1948); *Henderson v. United States,* 12 F. 2d 528 (4th Cir. 1926). In these cases, the search is exploratory and for that reason "unreasonable," and being unreasonable is absolutely prohibited by the constitution.

In this cause the officer merely claimed that he saw the Petitioner in a certain vicinity and arrested him on sight for, as he stated, a felony. Why this was an obvious tactic, cleverly designed to circumvent the law, will be easily exposed by the objective consideration surely to be given our cause.

It is our contention, despite testimony of the officer that the arrest followed the search of the car, that the arrest occurred at the point the police "stopped the car." *Henry v. United States, supra,* at 103. Now, the significance of the moment of arrest is based on the principles of the Fourth Amendment, which define the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizure. The search of Beck was ruled by the Trial Judge to be incident to this arrest (R. 12). The essential question then is: Did probable cause exist for the arrest of William Beck without a warrant?

The undisputed evidence was that the detectives curbed Beck's car and immediately commenced to search it, later taking him to the station where a more thorough search of his person was conducted which disclosed the contraband. If the arrest was not proper, the subsequent finding of this evidence could not make it good. Surely, the officer is not to be permitted to justify the search by the arrest. This "boot-strap" argument has been expressly condemned. See, *McDonald v. United States,* 335 U. S. 451 (1948).; *Johnson v. United States,* 333 U. S. 10, 16-17 (1947).

Also, and most assuredly, the detectives in calling upon Beck to stop did so by virtue of their official position. This compulsion exercised by the officers then and there, in depriving him of his freedom of proceeding along a public street, constituted an arrest. Again, if prob-

able cause did not exist prior to finding the illegal slips, the search cannot be sanctioned; notwithstanding, the contrary view expressed by the Supreme Court of Ohio below.

WHERE AN ARREST IS NOT EXPRESSLY SANCTIONED BY STATUTE, THE ARREST IS UNLAWFUL AND THE INCIDENTAL SEARCH UNREASONABLE.

With a valid warrant, a police officer can arrest for a felony or a misdemeanor. It makes no difference whether or not the crime is committed in his presence. Probable cause in such instance is predetermined or at least should have been. Article IV, U. S. Constitution; R. C. of Ohio, § 2933.22. Cf., *Aguilar v. Texas*, 32 USLW 4499 (1964) and *Giordenello v. United States*, 357 U. S. 480 (1958).

The method and time of executing an arrest warrant are set forth in our statute (R. C. of Ohio, § 2935.12), compliance with which is mandatory. On the other hand, many incidental searches, in all other respects reasonable, have been held "unlawful" for failure to comply with the provisions concerning notification to arrestee of purpose and authority. *Miller v. United States*, 357 U. S. 301 (1958); *Keiningham v. United States*, 287 F. 2d 126 (1960); *Accarino v. United States*, 179 F. 2d 456 (1949).

In Ohio, as elsewhere, a police officer may arrest for any crime, felony or misdemeanor committed in his presence. Cf., e.g., Revised Code of Ohio, § 2935.03 and 18 U. S. C. A., § 3052 (Supp. 1963). This right to arrest for a crime not committed in the presence of the police officer is strictly limited for the protection of the public. Thus, a police officer may never arrest for a misdemeanor not committed in his presence. Such an arrest is invalid as is the search incidental thereto.

Our statutes in Ohio also specify when and how a

warrantless arrest may be made for crimes not committed in view of an officer. Accordingly, Revised Code of Ohio, § 2935.04, provides, in substance, that: when a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of such offense, and detain him until a warrant can be obtained. 5 *Ohio Jur.* (2d), Arrest, § 25, pp. 38-39.

To sum up, if the crime is committed in the presence of the police officer he may arrest without a warrant for felonies or misdemeanors. When not committed in his presence, he may make such arrest only if he has probable cause to believe a felony has been committed and probable cause to believe the person arrested committed it. If the arrest is not expressly sanctioned by statutes, the arrest is unlawful and as a consequence the incidental search unreasonable.

Not only this but, basically the concept is that no search can ever be made without a search warrant. The only exception, other than waiver or consent, is search incident to a lawful arrest. In this regard even probable cause for making a search cannot justify the officer making such search without a warrant. *Jones v. United States*, 357 U. S. 493, 497-498 (1958); *Agnello v. United States*, 269 U. S. 20 (1925). Hence another query must be: did the officer possess sufficient information as would have justified the issuance of an arrest warrant, because "[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be

destroyed." *Wong Sun v. United States*, 371 U. S. 471, 479 (1963).

Next, these statutes also provide that persons arrested without a warrant shall be informed of the cause of their arrest. Revised Code of Ohio, § 2935.07. Cf., *Miller v. United States, supra*. Suffice it to say there is little uncertainty, at least, in this area of the substantive law of searches and seizures. There must be probable cause to make the arrest and there must be a statutory right to arrest. Compliance with these statutes is mandatory and if the arrest is unlawful, the incidental search is unreasonable and the product of such search is not admissible in evidence to convict. *Mapp v. Ohio, supra*, at 355.

Based on these principles alone, it is apparent that the arrest of this Petitioner cannot pass muster. First, there was no probable cause for the arrest. Next, no crime was committed in the presence of the officer and there was not reasonable ground to believe the felony particularized (and any other felony) was involved. Further, Beck was not informed of the cause of his arrest. Not only this but if this search, conducted under such a frame of reference, is not proper to be designated exploratory, it would be most difficult to even hypothesize a suitable fact situation for purposes of illustration.

A SEARCH WHICH IS UNREASONABLE FOR A WANT OF PROBABLE CAUSE CANNOT BE MADE REASONABLE BY WHAT THE SEARCH UNCOVERS.

Perhaps the greatest source of difficulty in this whole area of searches and seizures involves a search made without a warrant and, as was done here, pursuant to an arrest without an arrest warrant. Such an arrest is valid (if it is, so is the ensuing search) if it is for a misdemeanor committed in the officer's presence, or when based upon

the reasonable grounds relative to a felony—as argued above. Cf., *Draper v. United States*, 358 U. S. 307 (1959).

Our problem, however, has to a degree been delimited by the arresting officer's conclusion, adopted by the Supreme Court of Ohio in its opinion, that the arrest of Beck was for a "felony" which the officer stated he believed had been committed by William Beck. *State v. Beck*, 175 Ohio St., at 75, (R. 17).

Concededly, it is unnecessary to have evidence sufficient to convict in order to have probable cause for search, seizure or arrest. *Carroll v. United States*, 267 U. S. 132, 161-162 (1955). Again, the crucial inquiry is whether there was probable cause to believe the "felony" referred to by the officer had been committed. See, dissenting opinion, *State v. Beck*, 175 Ohio St., at 81, (R. 23-24).

A. When the Identity and Existence of an Allegedly Reliable Informer Is Material to the Establishment of Probable Cause, the Court Must Require Disclosure.

Sergeant Delau (the arresting officer) in his evidence attempted to justify his actions on the basis of "confidential information" that had allegedly been given him (R. 6, 12). Now, the rule that an informer's tip may supply "probable cause" for an arrest or search must be regarded as subject to numerous exceptions and qualification. *Jones v. United States*, 362 U. S. 257 (1960); *Draper v. United States, supra*. The narrow purview of our discussion at this juncture is concerned not only with the propriety of the Trial Judge's ruling against disclosure, but also the announced view of the Supreme Court of Ohio which is in obvious conflict with the supreme law of the land as enunciated by this Court.

At the outset, it should be understood that Ohio does

not have a statutory privilege of confidentiality as between the policeman and an informer. Revised Code of Ohio, § 2317.02. Moreover, the Supreme Court of Ohio has expressly held that "* * * a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision." *In Re Story*, 159 Ohio St. 144, 147 (1953). It would thus seem to follow from a bare reading of this privilege statute, which does not confer any status to the policeman-informer relation, that the mere invocation of the doctrine of "expressio unius est exclusio alterius" should have been determinative.

Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have the issues raised by his defense properly determined. *Roviaro v. United States*, 353 U. S. 53, 62 (1957). Also, see, *King v. United States*, 282 F. 2d 392 (4th Cir. 1960); *Anderson v. United States*, 266 F. 2d 924 (D. C. Cir. 1959).

The constitutions of both the State and Federal Government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in Ohio's Revised Code, § 2933.22. In this regard, one of the prime issues raised by our Motion was the alleged nonexistence of probable cause. Certainly in this posture, the reliability of the informant, the credibility of the police officer who acted upon the information disclosed, and the soundness of the reason for reliance upon the information are proper matters for exploration by the de-

fense. Thus an accused is entitled to know the identity of the informer, to compel his testimony and then impeach his credibility. *Roviaro v. United States*, 353 U. S. 53 (1957).

Moreover, where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require such person's identity disclosed should render the search unlawful and require that evidence obtained from the search and seizure be excluded. See, *United States v. Blich*, 45 F. 2d 627 (D. C., Wyo., 1932), where the District Court ruled that the existence of probable cause could only be properly determined if the identity of the informer were disclosed.

Whether or not the arrest being assailed in this cause was legally done, to be sure, depends upon a determination as to whether or not the Ohio Courts applied the federal constitutional standards required by this Court's opinion in *Ker v. California*, 374 U. S. 23 (1963). The exact nature of these standards presents a judicial question. And although police officers often feel they have a well-grounded suspicion of a certain person's activities, the test as to whether or not any person's right to privacy can be traversed is of no mean significance. History has of course demonstrated that the zeal of our police, in the great State of Ohio, does not always conform to federal constitutional standards. *Mapp v. Ohio, supra, Haley v. Ohio*, 332 U. S. 596 (1958).

The word of an informer can supply "probable cause" for an arrest or search in certain qualified instances. The test, presently stated by this Court in *Draper v. United States*, 358 U. S. 307 (1959), seems to support the view that what is observed must jibe with what an informer

told him would occur. Further, the informer must be reliable; in that, "an uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause." *Contee v. United States,* 215 F. 2d 324, 327 (1954). Cf., *Worthington v. United States,* 166 F. 2d 557, 563 (1948), where the Court ruled:

> "In this case, the officers assumed that some denizen of the underworld was betraying appellant. They did not know who the enemy was, but they decided they would act on the anonymous information given, and that they would arrest appellant and search her home if they found nothing, it was probably assumed that appellant did not have enough standing in her community to question their unlawful conduct."

By the Court not requiring disclosure the status of this alleged confidential source became reduced to an anonymity. Certainly if identity were disclosed the defense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. *Wong Sun v. United States,* 371 U. S. 471, 479-484 (1963). Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge. *People v. Robinson,* 166 Cal. App. 416 (1958).

In the final analysis, the conviction herein being challenged must stand or fall on the determination whether there was probable cause for the arrest, which in turn depends upon not only the existence of an informer but his reliability. By denying the request for disclosure the

right to test the reasonableness of the officer's conduct (including but not limited to the reasonableness of his reliance on such informer) was thereby frustrated. The real fault characteristic, in addition to foreclosing even the possibility of a rational appraisal by the Court, is that such procedure permits the policemen to conclusively determine the validity of his own arrest. Why such an approach is not consistent with the constitutional standards developed by this Court is obvious.

In our view the cogent arguments in favor of disclosure are most compelling. Consider, in this regard, the view expressed in *Jones v. United States*, 271 F. 2d 494, 499 (D. C. Cir. 1959) where the rule was stated:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from the informer, that his identity be divulged, so that his reliability may be subjected to a meaningful judicial scrutiny rather than accepted on a policeman's word."

Likewise, in *Priestly v. Superior Court*, 50 Cal. 2d 812, 818 (1958), the California Supreme Court similarly ruled:

> "If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he could become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

B. Probable Cause to Arrest Without a Warrant Is a Judicial Question of Fact and Exists Only When the Circumstances Justify the Reasonable Belief That a Felony Has Been or Was Being Committed.

I.

Even if we assume that the Ohio Courts were correct in their rulings denying disclosure, and with this "so called informer" remaining anonymous, if he does exist; still, the evidence discloses nothing to justify the original arrest. Moreover, even following the search of Beck's person, which proved fruitful, the ultimate charge lodged against him was a misdemeanor (that is, a charge based on simple possession of the contraband slips, Revised Code of Ohio § 2915.111). This charge is distinguishable from the felony charge for which the officer testified he arrested the Petitioner; i.e., Carrying on a Scheme of Chance. Revised Code of Ohio, § 2915.13.

II.

The most often quoted statement in the argument against the quest for suppression of evidence is that the constitution does not prohibit all searches, only those that are unreasonable. And although it is only on the rarest of occasions that the State Court Prosecutors will not try to justify even obviously illegal police intrusion on the rights of an accused, the law is that State Courts are required to use the proper standards of reasonableness. See, *Ker v. California, supra,* at page 33.

In determining the issue of reasonableness, where as here, the facts and circumstances established that there was sufficient opportunity to obtain a warrant, can there be any question but that a failure to do so will render an ensuing search unreasonable. *Jones v. United States,* 357

U. S. 493, 499-500 (1958). A limited exception to this rule is operative where exigent circumstances justify an officer proceeding without the warrant. *Johnson v. United States*, 333 U. S. 10 (1947).

Here, however, the officer categorically stated that when he left the police station, on the day of Beck's arrest, he intended to arrest him and was later in the vicinity for that purpose. Stated simply, these officers knew in advance that they were going to arrest Beck, at least the Sergeant so testified. (R. 9.) What excuse then could justify their failure to obtain an arrest warrant; provided, they could qualify for one. Surely if they could not so qualify, they should not have made the arrest and/or search. However, the fact that they did not even seek a warrant must give rise to the cogent inference that their reason for not doing so was because they knew that on the sparse facts available to them, if they had any, no "neutral and detached magistrate" would have issued an arrest warrant based on the felony (R. C. of Ohio, § 2915.13) for which the officer testified he was arresting the petitioner.

In this regard, it is also our contention that this failure to even seek a warrant is most significant. This is so when viewed not only from the posture that the officers could not qualify for the issuance of one, but also, when considering these facts and circumstances as just another example of law enforcement by the Cleveland Police in general and Sergeant (now Lieutenant) Delau in particular. See concurring opinion of Mr. Justice Douglas in *Mapp v. Ohio*, 367 U. S. 643, at page 671, where it was stated, and rightly so, that the facts of *Mapp* show as would few other cases: "the casual arrogance of those who have untrammelled power * * *."

It may be enough to say that this same officer was the

prime arresting officer in the *Mapp* case, and the conduct described in that case, as having been in defiance of the law, was and is typical of the Cleveland Police Department, which continues to defy the power of this Court to restore to the citizens of Ohio their Constitutional guarantee against illegal searches and seizures.

CONCLUSION.

Admittedly, this Court in *Rugendorf v. United States*, 376 U. S. 528, 533 (1964), ruled that disclosure of the identity of an alleged informer was not required where a proper criteria necessitating such disclosure, with reference to the merits of that case, was not made. However, even in *Rugendorf*, it was recognized that (as was stated in *Jones v. United States*, 362 U. S. 257, 271 [1960]), there must be "a substantial basis for crediting the hearsay," and that, "the necessity for disclosure depends upon 'the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' " 376 U. S., at 534-535.

In this cause no such basis for crediting the hearsay existed. Further the fact that no other support for the arrest was offered; that is, other than the unbolstered word of an alleged informer, it is more than reasonable to suppose that if the officer did have any information, it was general and of an unspecified nature. Also, and as such, was not capable of providing a proper foundation as to justify a warrantless arrest.

Surely, by denying disclosure here, as to this Petitioner, the prohibition against illegal searches and seizure will have been emasculated. And the policeman, in spite of the constitution, will have very probably justified his arrest by the search.

Moreover, upon an objective analysis of this cause, we are left with an arrest without probable cause and without a warrant. In addition we have the brazen failure by the police to submit to any magistrate, for a proper determination of the question of the sufficiency of the "facts" within their knowledge, and of which they assertedly had reasonable and trustworthy information. All of which, the officer claimed, constituted the predicate for his belief that the arrest of the Petitioner (Beck) was properly indicated for the stated felony.

Also, and as a direct consequence of the Ohio Court's apparent unwillingness to vindicate those rights restored to Ohio citizens by *Mapp*, there is this revolutionary Ohio rule announced by our Supreme Court below; the effect of which is that: the testimony of police officers as to the existence of probable cause, and the reliability of an informant is not only conclusive but determinative of those issues.

There is thus evolved, the substantial query as to whether or not this Court can agree, with the Supreme Court of Ohio, that it takes less evidence in our state to arrest without a warrant than it apparently takes to get one. See, *City of Akron v. Williams*, 175 Ohio St. 186 (1963), and *State v. Watson*, 177 Ohio App. 333 (1962).

It is, to be sure, our view that this Court will not hesitate to vindicate the rights involved herein, that the Court will rule in favor of all the contentions being urged by the Petitioner. Also, that this Court will again declare that the limitation upon arrest and the introduction of illegally seized evidence will not be given grudging applications. Not only this, but such applications will be, "respected only insofar as consistent with federal constitutional guarantees." *Ker v. California, supra*, at 33.

Most earnestly, and for the reasons herein given, petitioner respectfully submits that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 18

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

OPINION BELOW.

The opinion of the Ohio Supreme Court (R. 15-26) is reported at 175 Ohio St. 73, 191 N. E. 2d 825 (1963).

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on June 26, 1963 (R. 16).

Petition for a writ of certiorari was filed December 23, 1963 and was granted February 17, 1964. 376 U. S. 905 (1964).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

INTEREST OF AMICI.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation and extension of civil liberties, and particularly the freedoms protected by the United States Constitution.

This brief of *amici curiae* is filed because it appears to us that the warrantless arrest and search which led to the conviction of the accused in this case—a conviction which flowed directly from the denial of a timely motion to suppress the evidence so obtained—collides violently with the federal constitutional standards to which state criminal procedure is obliged to conform. *Ker v. California*, 374 U. S. 23 (1963); *Mapp v. Ohio*, 367 U. S. 643 (1961).

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of the law of search and seizure with which all law enforcement officials, federal, or state, high or petty, must unswervingly comply, and in the hope that in some measure it may be of assistance to the Court in performing its delicate task of weighing "the social need that crime shall be repressed" [1] against "the social need that the law will not be flouted by the insolence of office," [2] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

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[1] Mr. Justice Cardozo, in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[2] *Ibid.*

QUESTIONS PRESENTED.

I.

In the absence of an emergency, and where the police had ample opportunity to procure a search warrant but failed to do so, is a warrantless search of the person of the accused *per se* unreasonable within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

II.

Did the arresting officer, whose only basis for a warrantless arrest and search was a police photograph of the accused, a record of three previous arrests for the same offense, and a tip from an unidentified informer, have probable cause sufficient to obviate the necessity of procuring a search warrant within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

III.

Is a warrantless arrest under a state statute which provides that a police officer may arrest without a warrant a person "found violating" state or municipal law invalid under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution where the contraband, possession of which is the gravamen of the offense charged, was completely concealed from the view of the arresting officer and was discovered only after a complete search of the clothing of the accused?

IV.

Where the sole issue at a hearing on a motion to suppress evidence is whether the arresting officer had probable cause to arrest and search the accused, do the Fourth,

Fifth and Fourteenth Amendments to the United States Constitution require that the arresting officer be compelled to disclose the identity of the informant whose tip resulted in such arrest and search, where the only other evidence showing probable cause in the arresting officer prior to the arrest and search were a police photograph and knowledge of three previous arrests of the accused?

STATEMENT OF THE CASE.

Petitioner, William Beck, was charged in the Cleveland Municipal Court with possession of clearing house slips under Ohio Revised Code Section 2915.111. (R. 1-2) Prior to the trial, petitioner filed a motion to suppress as evidence the clearing house slips which were taken from his person during a police search. (R. 3-4)

At the hearing on the motion to suppress, the only witness was the police officer who arrested the petitioner. He testified that, armed with a police photograph of the petitioner, knowledge of three previous arrests for clearing house operations and a tip from an informer whose identity he refused to reveal, he left the police station during daylight hours with the express purpose of arresting petitioner and "had in mind looking for [petitioner] in the area of 115th Street and Beulah." (R. 5-10)

The officer conceded that he had neither an arrest nor a search warrant (R. 8-9), although at the time he left the police station he fully intended to arrest petitioner. (R. 9) He admitted that the clerk's office, which was in the same building as the police station, and from which a warrant could have been sought, was open for business when he left the station. (R. 9) He explained his failure to seek a warrant as follows:

> "I couldn't get one under those conditions." (R. 9)

Shortly before 1:00 p. m. he saw petitioner driving an automobile on East 115th Street. The officer admitted that petitioner was driving lawfully. (R. 5)

The arresting officer and other policemen identified themselves and asked petitioner to pull over to the curb. (R. 6) When petitioner stopped, the officers searched the car. (R. 6) During the search of the automobile, petitioner was placed under arrest "for a clearing house operation, scheme of chance" and, when the search disclosed nothing, petitioner was taken to the police station. (R. 6) His person was searched and the clearing house slips were found "beneath the sock of [sic] his leg." (R. 7)

Attempts by defense counsel to compel the disclosure of the identity of the informer whose tip was instrumental in the arrest were frustrated by the trial court. (R. 10-11) Although the prosecutor urged that the identity of the informer was privileged, and defense counsel asserted his right to identify the informer in order to cross-examine as to his reliability and test the issue of probable cause, the court refused to compel the officer to identify the informer "on the grounds of irrelevancy." (R. 11) No testimony was offered as to the credibility of the informer, the previous reliability of his information, or other corroborating facts.

The motion to suppress was overruled. (R. 12) Petitioner stipulated that the facts upon trial would be essentially the same as the evidence elicited on the motion to suppress, and, on the basis of such testimony and the clearing house slips which had been introduced into evidence, he was found guilty as charged. (R. 12) The Court of Appeals of Cuyahoga County and the Ohio Supreme Court affirmed the conviction. It is these adverse decisions from which relief is sought here.

SUMMARY OF ARGUMENT.

The conviction of the accused on the basis of evidence obtained from a warrantless search of his person following a warrantless arrest raises grave constitutional problems involving the substantive law of arrest and search and seizure.

Amici contend

I. that, whether or not the warrantless arrest was invalid, the failure of the arresting officer to procure either an arrest or search warrant when there was ample opportunity to have sought one from a magistrate invalidates the search of the person which yielded the evidence upon which the accused was convicted.

II and III. that the arrest without a warrant was invalid, both

(A) because there was no showing of probable cause sufficient to satisfy the requirements of the Fourth and Fourteenth Amendments to arrest the accused, and

(B) Because the state statute employed to validate the arrest, as interpreted by the state court of last resort, does not meet the minimum federal constitutional requirements embodied in the Fourth, and Fourteenth Amendments to the United States Constitution.

IV. that whether or not the warrantless arrest was invalid, the refusal of the trial court at the hearing on the motion to suppress to permit defense counsel to probe the identity and reliability of the informer whose tip was responsible for the arrest, was itself in violation of the Fourth, Fifth and Fourteenth Amendments because

(A) it prevented exploration of the probable cause requirement embodied in the Fourth Amendment as applied to the states through the Fourteenth Amendment;

(B) it shifted the burden of establishing the validity of the arrest and search from the prosecution where it rightfully belongs; and

(C) it violated the concept of fundamental fairness protected by the due process clause of the Fourteenth Amendment.

ARGUMENT.

I.

The ingenious use by the Cleveland Police of a warrantless arrest to justify a warrantless search, with further justification of both by the contraband yield of the search so made, is alarming, the more so because all of the courts in the State of Ohio that have reviewed this police action have given it judicial sanction.

The principle that law enforcement officials are required by the Fourth Amendment to seek a warrant for an arrest and search except upon a showing of *urgent necessity* [3] has been too frequently ignored by the police, unfortunately, in many instances, with judicial acquiescence.

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[3] See *McDonald v. United States*, 335 U. S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The Fourth Amendment] guarantee of protection against unreasonable searches and seizures * * *, *with few exceptions*, stays the hand of the police *unless they have a search warrant* issued by a magistrate on probable cause supported by oath or affirmation. * * * We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency*, the Fourth Amendment has interposed a magistrate between the citizen and the police. * * * It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. * * * We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis added.)

The rule requiring a warrant has been, in large measure, eaten away by the corrosive exceptions which have been engrafted upon it. This circumvention of the requirements of the Fourth Amendment stems in large measure from the unfortunate[4] decision of this Court in *United States v. Rabinowitz*, 339 U. S. 56 (1950), which substituted the test of "reasonableness" of a search for the requirement of a warrant. But even in *Rabinowitz*, a magistrate had an opportunity to examine the facts alleged to demonstrate probable cause before the arrest because there the search was an incident of an arrest based upon a *valid warrant*. In the present case, a judicial officer never had an opportunity to judge the question of probable cause because the police justified their warrantless search of the person of the accused by an arrest which was also without a warrant. And their cynical disregard for the constitutional command to procure a warrant is best demonstrated by the facts in the instant case: the arresting officer left the police station during business hours of the court. Magistrates were available nearby to hear his application for a warrant of arrest or search had he elected to seek one. There was no particular urgency about arriving at the place of arrest, nor could he have known that the accused would be found in an automobile. As a matter of fact, the arresting officer knew that in advance of

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[4] See Frankfurter, J., dissenting in *United States v. Rabinowitz*, 339 U. S. 56, at 83-84:

> "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant. * * * It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable. * * * [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment."

the arrest he did not have sufficient information to obtain a warrant from a magistrate. Instead, at 1:00 p. m., he stopped the accused while driving lawfully on a public street on the basis of no more information than he could have presented to a magistrate before he left the police station.

So long as policemen are permitted the alternative of making arrests and searches without a warrant, it is apparent that they will not voluntarily seek them. Why should they apply for a warrant in which they must describe the place to be searched and the articles to be seized with particularity when they can arrest the suspect, conduct a general and roving search which a magistrate would never permit them by warrant and perhaps turn up some incriminating evidence which would justify the arrest *ab initio*? But such an approach, while efficient from the law officer's viewpoint, cannot be constitutionally justified on such grounds.[5]

The warrant which the Fourth Amendment so explicitly describes as a constitutional necessity is not "merely a requirement for a piece of paper." [6] This Court has had occasion to comment on the importance of the warrant in a free society most recently in *Aguilar v. Texas*, __ U. S. __, 84 S. Ct. 1509 (1964):

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed

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[5] See *McDonald v. United States*, 335 U. S. 451, 454-455 (1948), in which Justice Douglas speaking for the Court, said: "[T]here must be compelling reasons to justify the absence of a search warrant. * * * No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement. * * *".

[6] *United States v. Rabinowitz*, 339 U. S. 56, 60 (1950) (dissenting opinion).

and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests.' *United States v. Lefkowitz*, 285 U. S. 452, 464. The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule 'that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' *Johnson v. United States*, 333 U. S. 10, 14. Under such a rule 'resort to [warrants] would ultimately be discouraged.' *Jones v. United States*, 362 U. S. 257, 270. * * *

"* * * As so well stated by Mr. Justice Jackson:

'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States, supra*, at 13-14."

Both before and since the holding in *Rabinowitz*, this Court has on a number of occasions pointed out that policemen are *not* permitted to make their own choice as to whether or not they will procure a warrant before making an arrest and search—that where urgent necessity to arrest and search are not present and it is practicable to procure a warrant, an arrest or search without one will be constitutionally defective, even where the officers had the requisite factual knowledge to constitute probable cause.

Chapman v. United States, 365 U. S. 610, 613 (1961); *McDonald v. United States*, 335 U. S. 451 (1948); *Johnson v. United States*, 333 U. S. 10 (1947); *Taylor v. United States*, 286 U. S. 1 (1932); *Agnello v. United States*, 269 U. S. 20, 33 (1925); *Weeks v. United States*, 232 U. S. 383 (1914). And see *Trupiano v. United States*, 334 U. S. 699 (1948), overruled on this point two years later in *Rabinowitz*.[7] It is true that the search of stationary premises was primarily in issue in these cases, while in the instant case the person of the accused was searched after being apprehended in an automobile; but the imperatives of the Fourth Amendment apply to searches and seizures of persons as well as the search of their houses, *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955), and their mere presence in an automobile does not deprive them of the immunity from search of the person to which they would otherwise be entitled, *United States v. Di Re*, 332 U. S. 581, 587 (1948).

It cannot be denied that the integrity of the person is at least as legitimate an area of privacy to be constitutionally protected as the drawers in his house. Cf. *Rochin v. California*, 342 U. S. 165 (1952); *United States v. Townsend*, 151 F. Supp. 378 (D. D. C. 1957); *Breithaupt v. Abram*, 352 U. S. 432 (1957).

Nor can it be validly contended here that the search of the person was necessary or incidental to protect the arrest, or the lives of the arresting officers, for two reasons: (1) there is no right to protect an arrest which is itself invalid; and (2) the accused was already in custody and the arrest was secure before the search of the

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[7] See the dry observation of Mr. Justice Black in *Rabinowitz*: "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule * * * at least long enough to see how it works." 339 U. S. at 67 (dissenting opinion).

person was commenced. Cf. *Preston v. United States* -- U. S. --, 84 S. Ct. 881 (1964). (After suspects are in custody, there is no excuse for a roving search for weapons.)

The instant case provides a clear illustration of a situation where a law enforcement officer had ample opportunity and time to procure a warrant in advance of an arrest and search, but failed or refused to do so. It should stimulate this Court to re-examine the broad exceptions which have emasculated the general rule that a warrant is an imperative of the Fourth Amendment, to limit these exceptions to the most stark police necessity, and to reaffirm the principle that, whether or not a search is incident to a valid arrest, "law enforcement agents must secure and use search warrants wherever reasonably practicable." *Trupiano v. United States, supra.* And such a rule is particularly compelling where, as here, the arrest was made without a warrant for a crime not committed in the presence of the arresting officer.

II and III.

While there was some question as to which of two Ohio statutes[8] were used to justify the arrest of the accused without a warrant in this case, the circumstances of the arrest here did not comply with the minimum federal

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[8] The majority of the Ohio Supreme Court found that the accused was arrested for a *felony*, which under Ohio Rev. Code, Section 2935.04 requires a showing of "reasonable ground to believe that a felony has been committed" and "reasonable cause to believe" the accused "is guilty of the offense" in order to justify a warrantless arrest; the minority felt that he was arrested for a *misdemeanor*, which, in order to validate an arrest without a warrant, requires that the accused be "found violating a law. * * *" Ohio Rev. Code, Section 2935.03. See majority opinion, *State v. Beck*, 175 Ohio St. 74, 75 (1963) and dissenting opinion, 175 Ohio St. at 81.

standards of arrest contained in the Fourth Amendment to the United States Constitution.[9]

In view of the historical context in which the Fourth Amendment language was forged and its express language which delineates protections against unreasonable "seizures" of "persons" as well as "searches" of "houses, papers and effects," it seems clear that the constitutional requirement of a warrant based upon probable cause is as applicable to arrests of the person as to searches of premises. "The [Fourth] Amendment protects the people against the seizure of their persons as well as against the search of their houses." *Wrightson v. United States*, 222 F. 2d 556, 559 (D. C. Cir. 1955). This Court has so held. *Henry v. United States*, 361 U. S. 98, 100 (1959); *McGrain v. Daugherty*, 273 U. S. 135, 156 (1927); *Albrecht v. United States*, 273 U. S. 1, 5 (1927); and see *Cochran v. United States*, 291 F. 2d 633, 634 (8th Cir. 1961). It follows ineluctably that the extension of the commands of the Fourth Amendment to the states by *Mapp v. Ohio*, 367 U. S. 643 (1961) as to searches applies equally to the law of arrest, although it is clear that a state may fashion statutory requirements for a warrantless arrest which exceed the minimum federal constitutional standard if it should desire to do so, and the constitutional validity of an incidental search will then be determined by the higher state standard. *United States v. Di Re*, 332 U. S. 581 (1948).

If the warrantless arrest was made pursuant to Sec-

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[9] "The right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable *searches* and *seizures*, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be *seized*." U. S. Const. Amend. IV. (Emphasis supplied.)

tion 2935.04 Ohio Revised Code,[10] the express language of the statute, as well as the command of the federal constitution, requires a showing of probable cause prior to the warrantless arrest. If the arrest was made on the basis of Section 2935.03 Ohio Revised Code,[11] the statute, to be applied to the instant facts, must be interpreted to permit a warrantless arrest in the absence of probable cause, merely upon a showing that the accused had upon his person, concealed from the arresting officer's view, contraband, possession of which was an offense under Ohio law.[12] And such an interpretation by the state court of last resort[13] would invalidate the statute and the arrest as repugnant to federal constitutional standards.

In either event, unless it can be shown that the ar-

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[10] "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another *whom he has reasonable cause to believe is guilty of the offense.* * * *" (Emphasis supplied.)

[11] "A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal corporation.* * * *" (Emphasis supplied.)

[12] Such an interpretation, while necessary to uphold the validity of the arrest here, has neither factual basis nor logic to commend it. See dissenting opinion of Gibson, J., below, 175 Ohio St. at 81-82:

> "* * * for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be *revealed* in the presence of the officer and the officer must *perceive* that the offense is being committed * * *.
>
> "* * * The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody * * * of a packet of clearinghouse slips under his sock and inside his trousers. * * * In my opinion, * * * the defendant was not '*found* violating a law of this state' by the officer * * *."

[13] The construction of a statute by the highest court of a state fixes its meaning for the purpose of considering its constitutional validity. *Winters v. New York*, 333 U. S. 507, 514 (1948).

resting officer, prior to the arrest of the petitioner, had probable cause to believe that the accused was guilty of an offense, the arrest is invalid, and the fruits of the search of his person made incidental thereto must be suppressed.[14]

While evidence necessary to establish guilt is not required to demonstrate probable cause,[15] the mere good faith of the arresting officers is insufficient.[16] "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." [17]

Prior to the detention of the accused,[18] the arresting officer knew, as a matter of personal knowledge, only of petitioner's three prior arrests for clearinghouse operations. Whatever information he had about the *current* criminal activity of the accused came exclusively from a tip from an unidentified informer, whose credibility and previous record for giving reliable information were neither established nor disclosed by the prosecution.

Informer testimony alone can never be sufficient to constitute probable cause. *Cochran v. United States*, 291 F. 2d 633 (8th Cir. 1961). "An uncorroborated tip by an

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[14] *Henry v. United States*, 361 U. S. 98, 102 (1959); *Johnson v. United States*, 333 U. S. 10, 15 (1947).

[15] *Brinegar v. United States*, 338 U. S. 160 (1949).

[16] *Henry v. United States*, 361 U. S. 98, 102 (1959).

[17] *Ibid.*

[18] When the liberty of movement of the accused was first restricted by his being hailed to the curb by police, he was under arrest for purposes of determining the existence of probable cause, regardless of when the police say he was arrested. *Henry v. United States*, 361 U. S. 98, 103 (1959). But placing the arrest *after* the fruitless search of the car provides scant comfort to the arresting officer in his attempt to justify the arrest; it merely adds an additional piece of knowledge to the arresting officer's barren arsenal of information: awareness of the *lack of incriminating evidence* in the vehicle the accused was driving.

informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest." *Contee v. United States*, 215 F. 2d 324, 327 (D. C. Cir. 1954). Unless the record demonstrates additional corroborative evidence within the personal knowledge of the arresting officers—knowledge either of the facts concerning guilt or of the reliability of the informer's information—the information can convey to the arresting officer no more than "mere suspicion" and an essential ingredient of probable cause is lacking. *Jones v. United States*, 362 U. S. 257 (1960); *Draper v. United States*, 358 U. S. 307 (1959). "In testing the sufficiency of probable cause for an officer's [arrest] without a warrant [this Court] has held that he may rely upon information received through an informant rather than upon his direct observations, *so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.*" *Jones v. United States, supra*, at 269. This Court's insistence upon "facts within the knowledge of the [arresting officer]" as a necessary element of probable cause is a thread that runs consistently through the fabric of the decided cases. *Director General v. Kastenbaum*, 263 U. S. 25, 28 (1923); *Stacey v. Emery*, 97 U. S. 642, 645 (1878). It will not do to find, as the court below did,[19] that such direct knowledge of facts corroborating the informer's tip flows from the mere fact that the accused was actually found in the general locality where the informer said he would be, *so long as the behavior of the accused when*

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[19] "* * * Information was given to the police by an informer that defendant would be in a certain locality at a certain time *pursuing his unlawful activities*. He was found in that locality, as predicted, *driving an automobile*. * * * [O]fficers sometimes base a part of their activities on information supplied them by informers, and *the only way to verify the reliability of such information is to make use thereof.*" *State v. Beck*, 175 Ohio St. 73, 74, 76 (1963). (Emphasis supplied.)

apprehended was innocuous. Acts which are "outwardly innocent" cannot constitute that factual knowledge which is essential to probable cause. *Henry v. United States,* 361 U. S. 98, 103 (1959). Nor is the fact that the arresting officer knew of previous arrests of the accused for similar offenses an independent piece of information bearing on the question of whether he was guilty of an offense *at the time of the arrest,* despite the reliance placed upon this item of policeman's knowledge by the court below.[20] Else an accused with a prior criminal record could never be the subject of an illegal arrest.

Apart from these, the record in this case is barren of any other fact, substantial or insignificant, upon which may be predicated probable cause to arrest the accused without a warrant while he was driving an automobile lawfully, in daylight hours, on a public street where he had a perfect right to be. But for the contraband yielded by the search of the person of the accused which formed the basis of his conviction, the guilt of the accused is fashioned from spider webs. Although "whenever a culprit is caught red-handed * * * it is difficult to adopt and enforce a rule that would turn him loose," [21] it is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States,* 333 U. S. 10, 15 (1947). This Court "has had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts

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[20] "The Cleveland police had *good reason* to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. *There was testimony that he had previously been convicted on that score.*" *State v. Beck,* 175 Ohio St. 73, 74 (1963). (Emphasis supplied.)

[21] Douglas, J., dissenting in *Draper v. United States,* 358 U. S. 307, 314 (1959).

and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948).

IV.

Quite apart from the validity of the warrantless arrest and search in the instant case, the refusal of the trial court at the hearing on the motion to suppress evidence to permit defense counsel to probe the identity and reliability of the informer upon whose tip the arrest was made, raises serious and important constitutional questions.

The extent to which an accused must sacrifice important Fourth Amendment rights to protect the policeman's sources of information and the safety of his informer is a delicate and complex matter. The trial court's ruling based upon relevancy (!) missed the point entirely. And the court below resolved the question by not considering it.[22]

On the one hand, it is admitted that in some cases, the security of the informer and his effectiveness as a police instrumentality depends upon his anonymity. But where the legality of an arrest and search has been placed in issue, both minimum standards of fairness and the imperatives of the Fourth Amendment require that the accused be permitted on cross-examination to probe beneath the arresting policeman's bare assertion that he had probable cause (based upon the tip of an informer whose identity and reliability he will not disclose) to make the arrest. If permitted to cross-examine, defense counsel may find that there are no facts within the knowledge of the

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[22] "The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And *a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration* in the circumstances narrated." *State v. Beck*, 175 Ohio St. 73, 77 (1963).

arresting officer which corroborate the informant's information,[23] that the arresting officer had no prior or subsequent information as to the reliability of the informer's tip,[24] or that the informant was himself instrumental in the crime with which the accused was charged.[25] "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U. S. 53, 62 (1957).

If probable cause is an essential constitutional element to validate an arrest and search, as this Court's prior decisions in this area insist, the surest way to emasculate the requirement in practice is to deny defense counsel extensive cross-examination of the prosecution's witnesses as to the factual basis of the knowledge urged by them to justify the arrest and search. For it is not unknown for law enforcement officers to create a fictitious informer to supply the basis for an arrest and attempt to enshroud their fraud in secrecy by refusing to divulge the faceless informer's identity. E.g., *King v. United States*, 282 F. 2d 392 (4th Cir. 1960). "* * * [T]here comes a point where this Court should not be ignorant as judges of what [they] know as men." *Watts v. Indiana*, 338 U. S. 43, 52 (1949).

Moreover, apart from the necessity of disclosure of pertinent details of an informer's identity and information

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[23] Fatal to a finding of probable cause to justify an arrest or search. *Husty v. United States*, 282 U. S. 694, 701 (1931).

[24] Equally disastrous to the claim of validity of the arrest and search. *Draper v. United States*, 358 U. S. 307 (1959); *Jones v. United States*, 357 U. S. 493 (1957).

[25] Facts which would eliminate the requirement of secrecy as to the informer's identity. *Roviaro v. United States*, 353 U. S. 53 (1957); *Portomene v. United States*, 221 F. 2d 582 (5th Cir. 1955); *United States v. Conforti*, 200 F. 2d 365 (7th Cir. 1952); *Sorrentino v. United States*, 163 F. 2d 627 (9th Cir. 1947).

as a means of assuring the continued function of Fourth Amendment protections, "a further limitation on the applicability of the privilege [against disclosing the identity of informers] arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Roviaro v. United States*, 353 U. S. 53, 60 (1957).[26]

Nor can respondent take comfort from this Court's recent decision in *Rugendorf v. United States*, 376 U. S. 528 (1964), holding that, under the circumstances of that case, the name of an informer need not be disgorged at a hearing on a motion to suppress. For a careful reading of *Rugendorf* discloses the fact that the affidavit and the testimony at the pre-trial hearing demonstrated ample corroborative factual detail to support a finding of probable cause, *independent of the identity and reliability of the informer*. In the case at bar, the prosecution, in its effort to demonstrate probable cause, must sink or swim on the reliability of the informer's tip, *because the record is completely barren of any other evidence whatever* to sustain its burden of proof of the validity of the warrantless arrest.

Furthermore, it must be noted that, although petitioner in the instant case attacked the legality of his arrest

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[26] Lest it be urged that such disclosure may be compelled only at the actual trial of the accused and not by preliminary motions, the *Roviaro* court was dealing with a pre-trial motion for a bill of particulars. See also *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

and search at his earliest opportunity, the prosecution never produced testimony in chief showing corroboration of the facts of the informer's tip nor prior or subsequent reason to rely on such information. Since the burden of showing probable cause is upon the prosecution,[27] "courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority. Certainly the police have been warned enough in these respects * * *." *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

Absent evidence to sustain its burden of proof as to probable cause without the informer's information and upon its failure or refusal to lay an appropriate factual foundation for invoking the privilege against revealing the identity of its informer, the prosecution's witness should have been compelled to answer questions concerning the alleged informer and his information. Failure of the trial court to compel disclosure or, in the alternative, dismiss the charge, is violative of the Fourth Amendment and due process of law. *Roviaro v. United States*, 353 U. S. 53 (1957).

CONCLUSION.

Amici have urged the invalidity of the warrantless arrest and resulting search, the impropriety of the trial court's refusal to permit defense counsel to probe the identity and reliability of the informer whose information was the basis of the arrest, and the unconstitutionality of the warrantless arrest and search when there was ample time and opportunity to procure a warrant. For these reasons, *amici* urge this Court to reverse the conviction of the petitioner.

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[27] *Cervantes v. United States*, 263 F. 2d 800 (9th Cir. 1959).

In seeking reversal of this petitioner's conviction for a "numbers" offense, *amici* share the view of Mr. Justice Jackson:[28]

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

Respectfully submitted,

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[28] *McDonald v. United States*, 335 U. S. 451, 459 (1948) (concurring opinion).

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 28 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
On Writ of Certiorari to the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
On Writ of Certiorari to the Supreme Court of Ohio.

OPINIONS BELOW.

The Ohio Court of Appeals affirmed the judgment of the trial court without rendering a formal opinion. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

The formal opinion announced by the Supreme Court, with two judges dissenting, was officially published in 175 Ohio State 73 (1963).

QUESTIONS PRESENTED FOR REVIEW.

1.

Were the clearinghouse slips obtained by illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2.

Did the trial court err in refusing to order the police to disclose the identity of the informer?

STATEMENT OF THE CASE.

The police officers involved in the instant arrest had received confidential information that the Petitioner, William Beck, was carrying on a clearinghouse operation, scheme of chance. They also knew that the same William Beck had a record of three previous arrests and convictions which were indicative of the fact that he was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. They also had a photograph of the accused.

The officers were members of the Bureau of Special Investigation Unit of the Cleveland Police Department. They knew where to look for the petitioner. They went to that locality at a time of day when "pickup men" are most active picking up slips. They knew, from their own personal knowledge of the past history of Beck together with the information they had received, that if they did find Beck operating a motor vehicle in such neighborhoods they would have reasonable ground to arrest him.

It was about one o'clock in the afternoon of November 10, 1961 when the Defendant was first seen operating a motor vehicle on Beulah Avenue north of East 115th Street. The Defendant was ordered to stop, the police officers identified themselves, then searched the automobile but found nothing. The Defendant nevertheless was placed under arrest as being connected with the carrying on of a scheme of chance, conveyed to the 5th District where he was searched. An envelope with sheets of clearinghouse slips was found on his person. The Defendant subsequently was tried and found guilty as charged.

The Defendant was charged with violating Section 2915.111 of the Revised Code of Ohio. Before proceeding to hear the trial on the merits, the Court entertained a

motion to suppress the evidence. The Defendant offered testimony to show that in his opinion the motion to suppress should be granted. The Court, however, overruled the motion, contending the arrest was lawful and the search was incidental to the arrest; that the arrest was made upon reasonable grounds that a felony had been committed.

In due course application for new trial was made and overruled. The case was reviewed by the Court of Appeals of Cuyahoga County which affirmed the judgment of the trial court. The following statement appeared in the Legal News of this city:

> "25890. M. C.—State of Ohio vs. Beck. Judgment affirmed. The record discloses bona fide arrest of deft. during commission of felony (Section 2915.-111, R. C.) reported to police officer by informant, Knowledge of police officer of previous convictions of deft. for like offense and locale and method of committing said crime and we conclude and hold therefrom that there was probable cause for the arrest, that search of person was reasonable and, therefore, lawful, and that the disclosure of the name of the informant to be neither relevant nor material in the cause, Ballard vs. State, 43 Ohio St. 340; In re Quaries and Butler, in re McEntire and Goble, 158 U. S. 532, 535; State vs. Viola, 51 Abs. 577; Wigmore on Evidence, Vol. 8; para. 2374, page 751, 752, 756. Exceptions. O.S.J."

Thereupon the petitioner filed in the Supreme Court a motion to certify the record and appeal as of right. The motion was granted and the court heard the case on the merits. Judgment of the Court of Appeals was affirmed, *State vs. Beck*, 175 O. S., p. 73.

14 *O. Jur.* 2d 683. Courts.

> Section 248 * * * Syllabus as confined to the facts; application to other cases.

"The syllabus states the law with reference to the facts upon which it is predicated, and will not be regarded as controlling in another case in which the controlling facts are totally different, even though the legal questions involved are identical. It has been held that the Supreme Court's syllabi do not bind the Supreme Court or other courts in another case not on 'all fours.'"

The syllabus of *State v. Beck*, 175 O. S. 73 is as follows:

"1. All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.

2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him."

The law of the State where an arrest without a warrant takes place determines its validity. *U. S. v. Di Re*, 332 U. S. 589.

ARGUMENT.

The determination of probable cause must be based solely on facts and circumstances known to the arresting officer before, or in the case of a crime committed in his presence, contemporaneously with the arrest. The facts and circumstances to establish probable cause will differ with the crime committed. Yet, the test is always the same. Are the apparent facts which have come to the officer's attention sufficient in the circumstance to lead a reasonable, discreet and prudent man to believe that the offense is being committed?

In the case of "contraband" the lawless resort to every conceivable means to frustrate the police and avoid detection.

On the other hand the police must stand ready to act with certainty and dispatch when they have cause to believe a crime is being committed. What they will do will depend on what the occasion demands. If time allows and a search warrant is the appropriate action, that is the action that should be taken. However, on those occasions when the situation allows for nothing less than direct action, then they must act accordingly and be prepared to justify their action on the basis of the facts and circumstances known to them at the time of the arrest.

In reaching a decision in the present action, the statement of Mr. Justice Clark in *Mapp v. Ohio*, 367 U. S. 343, should be kept in mind and is as follows:

> "Our decision, founded on reason and truth, gives to the individual no more than that which the constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled."

What does the Constitution guarantee to this individual? Immunity from arrest even though he be carry-

ing on a continuing offense so long as the contraband is not visible to the naked eye! Should officers trained in all of the facets relating to the "Clearing House" operation and possessed of personal knowledge and information and observation of the conduct of the individual which causes them to have an honest and bona fide belief that they have found the individual to be committing a felony remain helpless because the exigency of the moment does not allow for the obtaining of a search warrant or an arrest warrant?

To what is honest law-enforcement entitled? There is only one answer. The government has the right and duty to maintain law and order. It must be given the chance and opportunity to apprehend the lawless; it must be given the right to exercise the means that reason and justice require. This is doubly true if the government is to meet the challenge of the policy and clearing house rackets; crimes, which by their very nature are secretive, elusive and deceptive. Actually, the policy people are vulnerable in only one operation and that is in the means they must resort to to gather in the money and the bet slips. This is the one time they are exposed to discovery. This State has gone to extreme measures to curb such activities. The Legislature has made it a felony to carry on a scheme of chance numbers games and has made the possession of contraband, i.e., "Clearing House Slips," a felony subject to a fine up to $500.00 and imprisonment of not more than six months for the first offense; and for a second offense shall be fined not less than $500.00 nor more than $1,000.00 and imprisoned not less than one year nor more than three years in the penitentiary. Our courts have held that possession of slips is a felony because you may be sentenced to the penitentiary for a second offense. The theory, of course, being that a person can never be sen-

tenced to the penitentiary for the commission of a misdemeanor.

This was not an exploratory search. There is no contention by the petitioner that he was ever molested by the police except on those occasions when the police had probable cause to arrest him. Regardless of how long he had been carrying on a scheme of chance in this particular neighborhood in 1959 and when he was arrested on this occasion, the police had good reason for their action. If it had been otherwise we are sure that such fact would be brought out in the examination of the arresting officer. He certainly would have been asked if he had ever stopped and searched this petitioner over the ensuing months and found no cause to arrest.

The very conduct of the petitioner makes it plain that he knew that his luck was running out. It is obvious that when he took such precautions to conceal the contraband in the leg of his pants that he sooner or later knew he would be stopped by the police. His only hope was that when that happened the police would overlook the contraband so cleverly concealed.

A careful study of the record in this case shows the carefully laid plan of counsel for petitioner collapsed when the officer responded to the question: "Why then did you place him under arrest?" and the response was: "I placed him under arrest for a clearing house operation, scheme of chance." From then on it was nip and tuck—the questioner tactfully avoiding any question which would give the officer an opportunity to explain his ground or belief which would justify the arrest, while the officer did the best he could, in spite of the questioner, to place in the record that he knew Mr. Beck had been in the clearing house racket, having been arrested three times in 1959; that he knew the petitioner on sight; that the police had a

photograph of Mr. Beck and that the police had good information he was carrying on a clearing house operation in the neighborhood of East 115th Street & Beulah Avenue in the city of Cleveland; that before the arrest the officer had planned to go to that particular neighborhood to arrest Mr. Beck if he was found making stops in that neighborhood. The only reason that the record does not contain the information in detail on which the officer in part relied was he was not given the opportunity to relate such information. In fact the petitioner did not question the reliability of the informer—he remained content to insist that the informer be identified by name and, of course, this the officer could not in good conscience do.

In the brief of the petitioner much time and space is devoted to expression of derision of the time honored part that the informer has taken in the frustration of the lawless. However, such discussion has no place here.

Clearly, the record shows that when the arrest was made the officer had sufficient information upon which he could rely to direct his attention to Mr. Beck and pursue an investigation of his own. He did not act solely upon the information received but evaluated it upon the information contained in the record pertaining to Mr. Beck's activities in 1959 and his own personal knowledge of Mr. Beck, after identifying him from his picture. We cannot surmise in detail all that was told to the police by the informer but it certainly must have been substantial since the petitioner, while insisting on knowing who his informer was, avoided asking the officer to relate in detail all that was told to him by the informer.

Under the state of the record the court's refusal to sustain the motion to suppress was not error.

On the motion to suppress the evidence the trial court had before it a question of law which had to be determined upon the facts and circumstances of *this particular case*. The rule is well settled that in the first instance the reasonableness of search and seizure is to be determined by the trial judge from the facts and circumstances of the case and in the light of fundamental "criteria" laid down by the 4th Amendment and the decisions of the United States Supreme Court, *Ker vs. California*, 374 O. S. 23; *United States vs. Rabinowitz*, 339 U. S. 56.

To support what is alleged in the motion, the petitioner called one and only one witness. He chose to rely solely on the facts developed by this witness to prove that the arrest was without probable cause.

None of the evidence offered by the petitioner was controverted by the State. Everything that the witness did testify to was indicative of the fact that there was probable cause for the arrest.

It is up to the trial judge to scrutinize and weigh in the light of the common experiences of man, evidence which tends to prove or disprove that the search and seizure was unreasonable.

> "Determination of 'probable cause' for search without a warrant requires a dealing with probabilities, which are not technical, but are factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians, act, and the standard of proof is accordingly correlative to what must be proved."
>
> *Brinegar v. U. S.*, 338 U. S. 160.

"There is no formula for determination of reasonableness. Each case is to be decided on its own facts and circumstances."

Go-Bart Co. v. United States, 282 U. S. 344-377.

The simple question that confronted the court was whether or not the facts and circumstances, which existed at the moment of arrest were evidence sufficient to constitute probable cause to arrest.

A very much respected opinion which deals with probable cause is found in *United States v. Rembert,* 284 Fed. 996. An excerpt from the opinion is as follows:

> " 'The provision against unreasonable searches and seizures, being directed to prevent general exploratory writs and investigations of the homes of persons and the property of the citizen, has no application to and does not prevent the arrest in accordance with the course of common law, and of the statutes directing the same without a warrant, and wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief, an arrest may be made without a warrant, and the instruments and evidence of crime seized.' "

The perpetrators of crimes against the state try to find refuge in the language contained in Section 2935.03 Revised Code, in that they attribute to the legislature an intention to give to the word "found" a hostile meaning against law and order, in that the officer is restricted to his sense of sight alone. Too many cases have been decided otherwise. See *Houck v. State,* 106 O. S. 195; *Ballard v. State,* 43 O. S. 340.

If a court does decide from the facts and circumstances of a particular case that probable cause does not exist, the proof of that fact should be so obvious that the decision leaves no room for speculation. The chasm that exists between what is reasonable and what is unreasonable should be so wide that a court which would rule one way when it should have ruled the other would be guilty of a gross abuse of discretion.

On the other hand if the evidence relied upon to decide if probable cause existed is of such weight that the scales may tip either way, then in that case whatever the decision the trial court may make it should be decisive. Under such circumstances an appellate court should not be prone to substitute its judgment for the trial court.

In the case of *Husty v. United States*, Vol. 282 U. S. page 694, on page 700 the court said in its opinion:

> "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonable, discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched."

Reasonableness of search and seizure is the ultimate constitutional test of the lawfulness of a search and seizure. It is the prerogative of the trial court to determine from the facts, circumstances and reasonable inferences that can be drawn therefrom whether or not a search is reasonable.

In this case the court could infer from the facts and circumstances that the police, being members of the Bureau of Special Investigation, were specialists in the arrest and investigation of crimes having to do with the clearinghouse racket. The court could infer also that at the time

the information was received, they understood that the petitioner was presently active in a particular neighborhood carrying on his assigned part in furthering the carrying on of a scheme of chance. The court could infer that the police knew the party who apprised them of this fact. The court could infer that this information together with what they already knew about the petitioner and observing him at a time of day in a particular neighborhood where they had no reasonable grounds to believe that he had any business there other than what they believed him to be doing, that is: carrying on a scheme of chance.

The court knew that at that moment the police could go no further—they had a choice, either arrest the petitioner or abandon the idea of apprehending a man that they had a bona fide belief was committing a felony in their presence. It was not a coincidence that the petitioner at the moment of arrest was carrying on a scheme of chance.

Columbus v. Riggle, 36 Ohio Law Abstract, 190 (decided September 9, 1941), headnote 1, Arrest (Abs. & O. Jur.):

> "1. A person arrested while driving his car upon the city streets in the course of collecting slips containing records of wagers of those engaged in the 'numbers game' was engaged in the commission of an offense in the presence of an arresting officer so that no warrant was required, it being clearly established that the numbers game is a game of chance prohibited by ordinance."

In *Houck v. State*, 106 O. S., 195, the facts in this case were that an officer had information regarding a particular individual transporting liquor in his automobile. The officer came upon the automobile while it was parked, searched the vehicle and found the incriminating evidence

—held to be a reasonable search. Syllabus 2 of this case is as follows:

> "A search of an automobile by an officer and a seizure by him of intoxicating liquors then being possessed and transported in violation of law, without a search warrant, is authorized though the officer has no previous knowledge of such violation, provided he acts in good faith and upon such information as induces the honest belief that the person in charge of the automobile is in the act of violating the law."

In the case of *U. S. v. Harris*, Vol. 331 U. S. page 145, the government officers had an arrest warrant for Harris. They questioned him in his apartment and incidental to the arrest searched the apartment. The officers found draft cards which were not related to the crime for which he was questioned. He nevertheless was charged with illegal possession of Government property and these draft cards were used as evidence against him. The court said on page 154 of its opinion as follows:

> "There during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property of which the Government was entitled to possession. In keeping the draft cards in his custody petitioner was guilty of a *serious and continuing* offense against the laws of the United States. A crime was being committed in the very *presence* of the agents conducting the search. Nothing in the decisions of this Court gives support to the question that under such circumstances the law-enforcing officers must impotently stand aside and refrain from seizing such contraband material." (Emphasis ours.)

A very pertinent statement applicable to the above subject is stated in the opinion of *State of Ohio v. Emerson Young*, No. 25915 in the Court of Appeals, Eighth Judicial District. We find on page 4 of the opinion the following:

"Numbers tickets are easily secreted on or about the person, just as stolen jewels, narcotics or money can easily be placed on the person. If one may stand in the presence of an officer who is making a lawful search of premises, bearing on his person contraband articles such as those above named and be secured from arrest and subsequent seizure of those articles, then enforcement becomes next to impossible, police officers are impotent, and the law-abiding people will become ruled by the lawless."

The United States Supreme Court held in *Draper v. United States*, 358 U. S. 307 "That information from a reliable informer corroborated by the agents observations as to the accuracy of the informer's description of accused, and of his presence at a particular place, were sufficient to establish probable cause for arrest without a warrant."

Summary.

The petitioner's hearing on the motion to suppress the evidence was fair and impartial and the determination arrived at by the trial judge was in accordance with the laws of Ohio, the constitution of this state, and the constitution of the United States; and concurs with the pronouncements of the United States Supreme Court in *Ker v. California*, 374 U. S. 23.

The trial judge was unique, he had been a police officer, a member of the Ohio State Legislature, a lawyer and a judge. In the Appellate Court two of the three members had occupied the office of Chief Police Prosecutor then Municipal Court judge, next a tenure on the Common Pleas bench, finally a number of terms on the Appellate bench; the third member had been a Common Pleas judge then an Appellate Court judge up until the time of his demise. Finally in the Supreme Court five members of the court had no difficulty in affirming the trial court's judg-

ment, and the writer of the majority opinion had been a member of the highest court of his state for thirty years! Certainly a decision, the fruit of such respectability, should stand untrammeled by the pique attack of its dissenters.

We cannot presume to know whether this judgment will be disturbed or not, but in either event the law of the case cannot be changed without the basic standards and principles which the United States Supreme Court itself has adhered to, also be changed.

So far as the petitioner's interest is concerned he is simply grieved with the result and not the law. There was no invasion of petitioner's rights under Ohio law nor the 14th amendment. In the trial court there was only a question of law to be resolved. This was not another *Dollree Mapp* case. All of the members of the Ohio Supreme Court were agreed that "under well established law, the search of defendant and seizure of the packets of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest"; five of the seven members of the court agreed that it was a valid arrest.

The record shows that in this case the defense witness repeatedly stated that he arrested the petitioner for the commission of a felony. These statements were not controverted by anyone. Yet in this Court and the Appellate Courts of Ohio the petitioner has asserted that the arrest was for a misdemeanor; though the highest court in this state has determined that the offense described under R. C. 2915.111 is a felony. *State vs. Beck*, 175 O. S. 73.

> "It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony." (Citing cases.)

In Ohio misdemeanors are defined by statute as minor offenses, O. R. Code 1.06. There is no provision in this state that provides that you may be sentenced to the penitentiary for the commission of a misdemeanor no matter how many times you commit the same offense. However, a person may be sentenced to the penitentiary for a subsequent violation of R. C. 2915.111. Therefore it is of small consequence what particular offense the petitioner was ultimately charged with so long as it related to the crime the police officers believed he was committing.

> "There is a difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest and search." *Brinegar v. United States,* 338 U. S. 160-172-173.

Although the petitioner directs the court's attention to numerous United States Supreme Court decisions, the controlling facts of those cases are totally different from the facts in this case. In the instant case the police had to find the petitioner at a time of day in a particular locality doing the very thing they expected to find him doing and when they did find him under such circumstances the only appropriate arrest that could be made, had to be made at the moment of discovery. There would be no time for obtaining warrants.

The officers knew that they had probable cause to arrest the accused and "Beck" knew that the officers had probable cause to arrest him. He knew at the time he was apprehended he was committing a continuing offense in the presence of the officers. In fact it can be gathered from the petitioner's minute preparations that he anticipated the arrest and had prepared for such a contingency. What he did not reckon with, however, is that the police would cart him off to a police station where an appropriate and complete search could be made for the clearinghouse slips which they knew had to be on his person.

The only hitch in the minority opinion is that it claimed it was not a valid arrest because in their opinion the arresting officer had to have something more than "probable cause." In their opinion a bona fide belief based upon probable cause was not enough. The officers had to actually see and identify the contraband while in possession of the accused before they could intercept him.

> "If the officers were to see the clearinghouse slips in the hand of the suspect or enough of the slips protruding above a pocket of the suspects to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence."

It is, however, inconceivable that the accused would be so foolhardy as to flaunt the evidence in the face of the police. Consequently, if the minority opinion is a correct one, then the officers of the law shall be required to stand idly by while such operations are carried on before their very eyes—but can do nothing because the contraband which they know is there is concealed from view and the operator of the automobile will not stand long enough for the officer to obtain a warrant to search and seize such contraband. As of now such a theory is unsupported by authority. The only support is the statement contained in the minority opinion in which the writer of the opinion states "In my opinion this misdemeanor was not committed in the presence of the officers."

How insincere was the belief of "Beck" that he was illegally arrested can easily be gathered from the questions asked the officer on direct examination (Pet. Brief 5 and 6). They were intended only to present a factual picture of the action which took place at the scene of the arrest and the subsequent search. Petitioner actually avoided asking the witness what was the information that "sparked" the investigation.

Certainly, the law is entitled to at least an equal chance in enforcement, as the criminal exercise in violating the law.

When the officers know their man! When they know his record! When they have information that he is back in the racket! When he is found under the same circumstances, doing the same thing that he had been doing on other occasions when he was arrested, shouldn't the police act with the same dispatch and urgency that the offender does in trying to get away with breaking the law?

Does the government have the right to refuse to reveal the identity of an informer or source of information?

So far as the decisions of this State are concerned the courts have consistently held that the government does not have to reveal such information.

The most recent case which has dealt with this subject is *State v. Viola*, 51 Ohio Abs. 577, decided June 6, 1947,—the headnote reads as follows:

> "In a criminal trial, a police officer should not be compelled to divulge the identity of his informant whose information led to the apprehension of the accused, since to compel him to do so would tend to cause persons possessing valuable information concerning crimes committed to conceal it from proper authorities for fear of unwanted publicity."

Other cases which have been decided in which the privilege has been discussed is *State, Ex Rel. Kehker v. Wolf*, 26 Ohio Nisi Prius (N. S.) 521, and *Parker v. Reddy*, 14 O. C. C. (N. S.) 288. Both of these cases held that communications made to police officers of the violation of the law are privileged communications.

It is usually the case, in each instance when this subject is discussed that reference is directed to the United

States Supreme Court case, *In Re Quarles and Butler, Petitioners*, 158 U. S. Reports, page 532. On page 535 of the opinion in that case the court said:

> "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and duty to communicate to the executive officers any information he has of the commission of an offense against those laws; and such information given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government."

The above mentioned United States Report has neither been reversed nor criticized in any later opinion of that Court so that it can be reasonably stated that as a general rule the government does have the right to refuse to reveal the identity of an informer or the source of information.

Admittedly, there are exceptions to the general rule. The exceptions, however, relate only to those instances in which the record contains facts which tend to show or imply that the identity of the informer is a necessary requisite to a fair trial. In the instant case, if the motion had been granted there would not have been a trial.

The leading authority upon which we must rely is *Roviaro v. United States*, 353 U. S. page 53. The applicable part of the syllabi is as follows:

> "A. Where disclosure of an informer's identity, or of his communication is relevant and helpful to the defense of an accused, or is essential to a fair trial, the

Government's privilege to withhold disclosure of the informer's identity must give way. (pp. 60-62.)

"B. However, no fixed rule is justifiable. The public interest in protecting the flow of information to the government must be balanced against the individual's right to *prepare his defense*. Whether nondisclosure is erroneous depends on the particular circumstance of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant facts. (p. 62.)" (Emphasis ours.)

In recent Federal Court cases—in those instances where search and seizure has been made *without* a search warrant, the courts have held where disclosure of informer's identity or contents of communication is *relevant on issue of probable cause* the court may require disclosure and if the government withholds information dismiss the action.

In the instant case it is well to note that the trial judge did not order the witness to relate the name of the informer, stating that such information was *irrelevant*.

When we realize that the accused when arrested was alone; that at the moment of arrest he had concealed upon his person "contraband" which he concealed in such a manner that he more than anyone else would know that he had possession of such "contraband" and the fact that he had been arrested on three previous occasions was ample notice to him that possession of such "contraband" was unlawful.

There is nothing in the record of this case to show the petitioner was deprived of "due process" nor that failure

to reveal the name of the informer was prejudicial to the rights of the petitioner.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 18

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

AMICUS CURIAE BRIEF OF THE COUNTY OF CUYAHOGA, A POLITICAL SUBDIVISION OF THE STATE OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

AMICUS CURIAE BRIEF OF THE COUNTY OF CUYAHOGA, A POLITICAL SUBDIVISION OF THE STATE OF OHIO.

OPINION BELOW.

The opinion of the Ohio Supreme Court (R. 15-16) is reported at 175 Ohio St. 73, 191 N. E. 2d 825 (1963).

INTEREST OF AMICUS CURIAE.

This brief is filed by the Prosecuting Attorney for Cuyahoga County, Ohio, on behalf of the County of Cuyahoga, State of Ohio, as amicus curiae pursuant to Rule 42, because the Prosecuting Attorney is charged by law with the investigation and prosecution of crimes arising in said county and consequently is interested in the determination of the issues presented by this case.

STATEMENT OF THE CASE.

The following statement of the case is substantially the same as that appearing in the brief filed on behalf of the respondent by the Director of Law of the City of Cleveland and the Chief Police Prosecutor, who prosecuted this case in the Municipal Court of Cleveland, Ohio.

The police officers involved in the instant arrest had received confidential information that the Petitioner, William Beck, was carrying on a clearinghouse operation, scheme of chance. They also knew that the same William Beck had a record of three previous arrests and convictions which were indicative of the fact that he was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. They also had a photograph of the accused.

The officers were members of the Bureau of Special Investigation Unit of the Cleveland Police Department. They knew where to look for the petitioner. They went to that locality at a time of day when "pickup men" are most active picking up slips. They knew, from their own personal knowledge of the past history of Beck together with the information they had received, that if they did find Beck operating a motor vehicle in such neighborhoods they would have reasonable ground to arrest him.

It was about one o'clock in the afternoon of November 10, 1961 when the Defendant was first seen operating a motor vehicle on Beulah Avenue north of East 115th Street. The Defendant was ordered to stop, the police officers identified themselves, then searched the automobile but found nothing. The Defendant nevertheless was placed under arrest as being connected with the carrying on of a scheme of chance, conveyed to the 5th District where he was searched. An envelope with sheets of clearinghouse slips was found on his person. The De-

fendant subsequently was tried and found guilty as charged.

The Defendant was charged with violating Section 2915.111 of the Revised Code of Ohio. Before proceeding to hear the trial on the merits, the Court entertained a motion to suppress the evidence. The Defendant offered testimony to show that in his opinion the motion to suppress should be granted. The Court, however, overruled the motion, contending the arrest was lawful and the search was incidental to the arrest; that the arrest was made upon reasonable grounds that a felony had been committed.

It was stipulated by the petitioner that the facts upon trial would be the same as the evidence presented on the motion to suppress. On the basis of the stipulation and the clearinghouse slips received into evidence, the trial court found the petitioner guilty as charged.

In due course application for new trial was made and overruled. The case was reviewed by the Court of Appeals of Cuyahoga County which affirmed the judgment of the trial court. The following statement appeared in the *Legal News* of this city:

> "25890. M.C.—State of Ohio vs. Beck. Judgment affirmed. The record discloses bona fide arrest of deft. during commission of felony (Section 2915.-111, R. C.) reported to police officer by informant, Knowledge of police officer of previous convictions of deft. for like offense and locale and method of committing said crime and we conclude and hold therefrom that there was probable cause for the arrest, that search of person was reasonable and, therefore, lawful, and that the disclosure of the name of the informant to be neither relevant nor material in the cause, Ballard vs. State, 43 Ohio St. 340; In re Quaries and Butler, in re McEntire and Goble, 158

U. S. 532, 535; State vs. Viola, 51 Abs. 577; Wigmore on Evidence, Vol. 8; para. 2374, page 751, 752, 756. Exceptions. O.S.J.".

Thereupon the petitioner filed in the Supreme Court a motion to certify the record and appeal as of right. The motion was granted and the court heard the case on the merits. Judgment of the Court of Appeals was affirmed, *State vs. Beck*, 175 O. S., p. 73.

QUESTIONS PRESENTED.

1. Were the clearinghouse slips obtained by an illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2. Did the trial court err in refusing to order the police to disclose the identity of the informer?

ARGUMENT.

1. There was no illegal search and seizure in this case, and the refusal of the trial court to sustain the motion to suppress was not erroneous.

Whether the search of the defendant and seizure of the clearinghouse slips was legal depends, of course, on the reasonableness of the search. This Court has laid down the standards of reasonableness many times and has held that a search which is incidental to a valid arrest, as in this case, does not constitute an unreasonable and illegal search. *Harris v. United States,* 331 U. S. 145, 91 L. ed. 1399, 67 S. Ct. 1098.

The doctrine that a search without a warrant may be conducted if incidental to a lawful arrest is a long established principle of law. In *Ker v. California,* 374 U. S. 23, 41, 10 L. ed. 726, 742, 83 S. Ct. 1623, 1634 (1963), this Court said:

> "* * * The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); Harris v. United State. 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); Abel v. United States, 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. (2d) 668 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal. L. Rev. 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v. United States, supra, 275 U. S. at 198-199, 48 S. Ct. at 76-77, 72 L. Ed. 231; United States v. Rabinowitz, supra, 339 U. S. at 61, 70 S. Ct. at 433, 94 L. Ed. 653; cf. Agnello v. United States, 269 U. S. 20, 30-31, 46 S. Ct. 4, 5, 6, 70 L. Ed. 145 (1925) * * *."

Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks v. United States*, 232 U. S. 383, 392 (1914); *Agnello v. United States*, 269 U. S. 20, 30 (1925).

If the arrest was legal, the contemporaneous search was also legal and contraband procured therein would be legally admissible in evidence.

When incident to a lawful arrest, a search without a warrant is reasonable. This is an exception to the constitutional provisions based upon necessity. *Johnson v. United States*, 333 U. S. 10; *Giordenello v. United States*, 357 U. S. 480; *Draper v. United States*, 358 U. S. 307.

In *United States v. Rabinowitz*, 339 U. S. 56 (1950), 94 L. Ed. 653, the headnotes 2, 4, and 6 read as follows:

"2. The right to search, without a search warrant, the person of an accused, when legally arrested, has always been recognized under English and American law."

"4. What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula, but depends upon the facts and circumstances of each case."

"6. A search without warrant does not violate the constitutional prohibition against unreasonable searches and seizures merely because the officers who carry out the search failed to procure a search warrant, although they had time to do so, since the legality of such a search turns upon the reasonableness under all the circumstances, and not upon the practicability of procuring a search warrant (overruling *Trupiano v. United States*, 334 U. S. 699)."

In *Harris v. United States*, 331 U. S. 145, 91 L. Ed. 1399, it is stated in headnote 5 as follows:

> "5. The test of reasonableness by which the constitutional permissibility of a search and seizure is determinable cannot be stated in rigid and absolute terms. *Each case is to be decided on its own facts and circumstances.*" (Emphasis supplied.)

The prohibition by the Fourth Amendment of unreasonable searches and seizures does not preclude search and seizure without a search warrant where incident to lawful arrest.

The necessity which justifies a search incident to an arrest arises from the need to protect the arresting officer, to deprive the prisoner of potential means of escape and to prevent the destruction of evidence. This destruction might consist of the dissipation of a narcotic drug by use by an addict. The arrest must be based on the existence of probable cause (or reasonable grounds, the terms being used interchangeably by the courts) for an arrest prior to the search. *McDonald v. U. S.*, 335 U. S. 451.

In *Brinegar v. United States*, 338 U. S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949), this Court defined "probable cause" as follows:

> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' McCarthy v. De Armit, 99 Pa. 63, 69, * * *. Probable cause exists where 'the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162 * * *.
>
> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interfer-

ences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

The Supreme Court of Ohio in the instant case stated as follows:

"Next, was there probable cause for making the arrest? 'Probable cause' is incapable of any exact definition applicable to all cases. However, the Supreme Court of the United States said in Henry v. United States, 361 U. S. 98, 102, 4 L. Ed. (2d) 134, 80 S. Ct. 168:

" 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.'

* * *

"Therefore, a question of fact is presented in each case, and where the facts in the possession of the police are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and the accused committed it, probable cause is present." 175 Ohio St. 75-76.

The reasonableness of a search and seizure is a question of fact to be determined in the first instance by the trial court. *State v. Young*, 91 Ohio Law Abs. 21, 185 N. E.

2d 33 (1962). This determination must, however, be made in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. *Ker v. California, supra.*

The law of arrest is determined by the law of the state where the arrest is made. In *U. S. vs. Di Re,* 332 U. S. 581, 588, 92 L. Ed. 210, 217, 68 C. Ct. 222, Justice Jackson states the rule in the majority opinion:

> "We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeable to the usual mode of process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest."

The reasonableness of the search in this case then turns upon the question of whether there was probable cause to arrest the petitioner at that particular time and place and under the prevailing conditions. Section 2935.04 of the Revised Code of Ohio specifically provides that when there is reasonable ground to believe that a felony has been committed, an officer may, without a warrant, arrest one whom he has reasonable cause to believe guilty of the offense and detain him until a warrant can be secured.

The situation here was not one where a beat patrolman more or less arbitrarily arrested someone on mere suspicion and proceeded to search him. The arresting officer here was assigned to the Bureau of Special Investi-

gation of the Cleveland Police Department, and had many times dealt with clearinghouse and similar operations. He had received information about petitioner's activities and whereabouts, had made his own observations, and knew that Beck had been convicted three times in connection with clearinghouse and gambling. The officer had reason to believe, from his knowledge of clearinghouse and previous observation in addition to the information given him by the informer that Beck would be in that particular vicinity at about that time of day, in connection with clearinghouse activities, and when he saw Beck there, he properly proceeded to arrest him under the belief that a felony had been committed.

As stated in the opinion of the Ohio Supreme Court: "Here, there was not an arrest merely for an exploratory search. According to the testimony, the police, based on the information they had, were actually looking for the defendant for the purpose of arresting him."

Petitioner contends that the search was unreasonable in that the officers could practicably have obtained a search warrant. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest.

This Court in the *Ker* case at page 31 stated that the *Mapp* case, however,

> "* * * established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U. S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court further, at page 33 of the *Ker* case, said:

> "* * * We reiterate that the reasonableness of a search is in the first instance a substantive determi-

nation to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees * * *"

In *Draper v. United States*, 358 U. S. 307, at 313, the Court said:

"In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. Brinegar v. United States, supra (338 U. S. at 175). Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves, to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280, 39 A. L. R. 790."

The right to seize clearinghouse slips, such as in the within case, when the possession of it is a crime, can not be questioned.

In *Harris v. United States*, 331 U. S. 145, sec. 91 L. Ed. 1399, this Court upheld the right to seize such property. Headnote 11 reads:

"11. A distinction exists between merely evidentiary materials which may not be seized either under the authority of a search warrant or during the course of a search incident to an arrest, and those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person might be effected, and

property the possession of which is a crime." (Emphasis supplied.)

A situation somewhat similar to that in the case at bar is presented in *U. S. v. Pierce*, 124 F. Supp. 264 (D. C. Ohio 1954), affd. 224 F. 2d 281 (6th Cir. 1957) where the police officers arrested an informer and found on his person a slip of paper bearing a telephone number of someone in Chicago. The informer told the officers that he had on several occasions procured heroin from such person. He called that person on the telephone and ordered heroin while the federal officers listened in to the conversation. Said person said he was leaving Chicago in about 40 minutes to deliver heroin to the informer. The officers then went to the railroad station and arrested the defendant, who fitted perfectly the description given them by the informer. The defendant had heroin in his possession. It was held that the arrest of the defendant without a warrant was proper, Section 2935.04 of the Revised Code of Ohio. In the opinion, by McNamee, District Judge, it is said at p. 266:

> "It is fundamental that not every search and seizure made without a warrant is illegal. As the Supreme Court said in United States v. Rabinowitz, 339 U. S. 56, 60, 70 S. Ct. 430, 432, 94 L. Ed. 653:
>
> > 'Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Weeks vs. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 344, 58 L. Ed. 652.'
>
> See also Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543.
>
> State law determines the validity of arrests without warrant. United States v. Di Re, 332 U. S. 581, 68

S. Ct. 222, 92 L. Ed. 210. Revised Code of Ohio, Section 2935.04 provides:

> 'When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.'

Certainly the facts and circumstances within the knowledge of the officers were sufficient in themselves "to warrant a man of a reasonable caution in the belief" that the defendant was guilty of a felony in the unlawful possession of narcotic drugs in violation of Section 3719.02 of the Revised Code of Ohio, and Section 2553 of Title 26 U. S. C. A. Indeed, the only fair and reasonable inference to be drawn from the defendant's appearance in the railroad station in Cleveland in the early morning of November 5, 1953 is that he was there to deliver narcotic drugs to the informer, as he indicated he would in the telephone conversations heard by the officers but a few hours before. There was abundant justification for the arrest of the defendant without a warrant."

The majority of the Ohio Supreme Court found that the accused was arrested for a felony. This satisfies the requirement in Section 2935.04 of the Revised Code of Ohio that the arresting officer have "reasonable ground to believe that a felony has been committed," and "reasonable cause to believe (the accused) is guilty of the offense." Complaint is made that because the petitioner was ultimately charged with violation of Section 2915.111 of the Revised Code, and because the penalty for the first violation of that section brings it within the misdemeanor class of offenses, the arrest is illegal in that the arresting officer had no reasonable grounds for belief that a *felony* was being committed.

That the officer's belief was justified is evidenced by the fact that the search produced a quantity of clearinghouse slips concealed in one of the petitioner's socks. The arresting officer, because of his expert knowledge as a member of the Bureau of Special Investigation, had good reason to infer that the petitioner's role in the operation was that of the "pickup man," an integral part of the numbers or clearinghouse operation, and that as such the petitioner was guilty of aiding and abetting in the sale of "numbers game" ticket (Ohio Revised Code sec. 2915.11), also possession of "numbers game" ticket (Ohio Revised Code sec. 2915.111), and carrying on a "numbers game" (Ohio Revised Code sec. 2915.13). Except for a first violation of section 2915.111, the penalty provisions of all these sections (Appendix A) make any violation thereof a felony. Hence, the arresting officer could well have had reasonable cause to arrest the petitioner on a felony charge as a conspirator and for aiding and abetting in clearinghouse operations.

The trial court asked the officer (R. 11):

> "When you placed this man under arrest, did you place him under arrest for a felony or a belief that a felony had been committed?
>
> The Witness: Under a belief that a felony had been committed under the State law, carrying on a scheme of chance is a felony, and on that basis, I arrested him".

An arresting officer makes his determination of whether probable cause for arrest without a warrant exists, and the court reviews such determination, not as a legal scholar determines the existence of consideration in support of a promise, but as a man of reasonable prudence and caution would determine whether the person arrested has committed a felony. See *People v. Harper*, 365 Mich.

494, 113 N. W. 2d 808, cert. den. 371 U. S. 930, 9 L. ed. 2d 237, 83 S. Ct. 302.

In arresting without a warrant a conclusion must be drawn by the police officer supported by facts and circumstances sufficiently strong in themselves to warrant a cautious and prudent man to believe the accused guilty of the crime for which he was arrested. There may be wide divergence concerning the reasonableness of the inferences or conclusions drawn, based on the facts which may have justified the arrest of the accused. Such interpretation by the police officer may not coincide with that of the accused, his counsel or the court, and each problem must be resolved by the circumstances of each particular case and there again the doctrine of probable cause becomes important. See *Varon, "Searches, Seizures and Immunities"* (1961), Volume 1, p. 195.

The arresting officer in this case, on the basis of the information he received from the informer, together with his knowledge of the defendant's previous convictions in connection with clearinghouse and the officer's personal observation, had good reason to believe that the defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. The opinion of the Supreme Court of Ohio so finds (R. 17):

> "The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped (fol. 22) the car and searched it, without result. Defendant was then arrested and taken to a police station,

and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction."

We submit, therefore, that there was no illegal search and seizure of the clearinghouse slips in this case, that the search was incident to a lawful arrest, and that the refusal of the trial court to sustain the motion to suppress was not erroneous.

2. There was no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer.

It is contended on behalf of the petitioner that prior to petitioner's arrest, the arresting officer knew "as a matter of personal knowledge" only that the petitioner had been arrested and convicted three times previously for clearinghouse operations, and whatever information of petitioner's activities the officer had came exclusively from the informer. It is argued that the accused should have been given the name of the informer in order that the latter's credibility could be tested. The record does not support this claim that the arresting officer's knowledge of the petitioner's current activities was derived solely from the informer. The officer testified (R. 8):

"Q. Did you have reasonable and probable cause to stop this man?

A. Yes, I did.

Q. Based on his previous record?

A. Information and previous record and observation."

Defense counsel did not cross-examine the officer as to the nature and extent of his observation, and has no-

where shown that the observation did not play an important part in the officer's determination that the arrest should be made.

The opinion of the Ohio Supreme Court in this case concludes that the revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated. The opinion distinguishes the situation in the instant case from that in *Roviaro v. United States*, 353 U. S. 53, L. ed. (2d) 639, 77 S. Ct. 623, where the informer not only gave information but took an active part personally in trapping and apprehending the offender.

The right to disclosure of the identity of the government's informers was considered by this Court in *Rugendorf v. United States*, ____ U. S. ____, 11 L. ed. 2d 887, decided March 30, 1964. The opinion in Rugendorf notes that in Roviaro "the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted." The opinion states that the petitioner in Rugendorf did not develop the criteria of Roviaro, i.e., that the necessity for disclosure depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possibile defenses, the possible significance of the informer's testimony, and other relevant factors." We submit that the petitioner in the case at bar, as in Rugendorf, has failed to develop the criteria of Roviaro and show that the name of the informant was necessary to his defense. The *Rugendorf* case is cited in the opinion in *Aguilar v. Texas*, __ U. S. ____, 12 L. ed. 2d 723, as authority for the conclusion that the "identity (of the informant) need not be disclosed."

The general rule on disclosure of the identity of persons furnishing the government with information concerning the commission of crimes is stated in 8 *Wigmore, Evidence,* Section 2374 (McNaughton rev. 1961):

> "A genuine privilege, on the fundamental principle stated *supra* Section 2285, must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reaction and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned."

CONCLUSION.

In seeking reversal of petitioner's conviction for a "numbers" offense, the amici curiae quote the view of Mr. Justice Jackson in *McDonald v. United States*, 335 U. S. 451, 459 (1948) (concurring opinion) that while the "numbers" lottery is one that ought to be suppressed, its suppression is not more important to society than the security of the people against unreasonable searches and seizures. This illustrates the danger of quoting out of context, for if fully quoted the *McDonald* case would reveal that there the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. The majority opinion by Mr. Justice Rutledge stated:

> "* * *In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me followed every step of their journey inside the house and tainted its fruits with illegality."

The case on review presents no parallel whatever with McDonald. As observed in the opinion of the Supreme Court of Ohio, the Cleveland police had good reason to believe that the petitioner was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. (175 O. S. 73.) This was not a situation

wherein a uniform policeman walking an assigned beat arbitrarily arrested and searched the petitioner. The arresting officer was a member of the Bureau of Special Investigation of the Cleveland Police Department. He went to the particular area at a definite time with information concerning the activities of the petitioner, with knowledge of the petitioner's record and the officer's own observation, and with a photograph of the petitioner. The officer arrested the petitioner for what the officer believed and had probable cause to believe was the commission of a felony.

This Court has left undisturbed the jurisdiction of the trial courts to determine in the first instance the test of reasonableness. The decisions of this Court have established that only unreasonable searches and seizures come within the interdict of the Fourth Amendment. *Mapp v. Ohio*, 367 U. S. 643, 6 L. ed 2d 1081, left undisturbed the jurisdiction of the state courts to determine in the first instance the "test of reasonableness." The standards of reasonableness cannot be stated in rigid and absolute terms. Each case is to be decided on its own facts and circumstances. Applying that test to the facts and circumstances of the case here on review, how can it be said that the officer did not have probable cause to arrest the petitioner at that time and place or that the subsequent search of his person at the police station violated the constitutional prohibition. Rather, the principles laid down in Mapp find reinforcement in this case.

Public policy and humanitarian concern support the rule concerning disclosure of the identity of the informer. Unfortunately for law enforcement, the fate of many informers whose names became known has been assassination at the hands of organized crime. In gambling, in narcotics, in prostitution,—the lifeblood of organized crime

—any interference with their operation has often resulted in prompt liquidation. This Court has held in a number of cases that where it is not shown (and in the vast majority of cases it cannot be shown) that the disclosure of the informer would aid in the defense of the accused, such identity need not be disclosed. As a matter of public policy that rule should not be disturbed.

We urge this Court to affirm the judgment of conviction in this case.

Respectfully submitted,

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APPENDIX A.

OHIO STATUTES INVOLVED.

Revised Code Section 2915.11. Manufacture, printing, and sale of "numbers game" tickets.

No person shall manufacture, print, vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

Revised Code Section 2915.111. Possession of "numbers game" ticket.

No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

Revised Code Section 2915.13. Promoting a "numbers game."

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for

or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.